

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

APRIL TERM, 1900.

No. 986.

15

JOHN K. COWEN AND OSCAR G. MURRAY, RECEIVERS
OF BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANTS,

v.s.

ADELAIDE M. MERRIMAN, ADMINISTRATRIX D. B. N. OF
ESTATE OF JOHN A. MERRIMAN, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 16, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

JOHN K. COWEN ET AL., Receivers, &c., Appellants, }
vs. } No. 986.
ADELAIDE M. MERRIMAN, Adm'x, &c. }

a Supreme Court of the District of Columbia.

ADELAIDE M. MERRIMAN, Adm'x, &c., }
vs. }
JOHN K. COWEN and OSCAR G. MURRAY, Re- } No. 41124. At Law.
ceivers of the Baltimore and Ohio R. R. Co. }

UNITED STATES OF AMERICA, { ss :
District of Columbia, }

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 Declaration, &c.

Filed June 4, 1897. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS, Plaintiff, }
vs. }
JOHN K. COWEN and OSCAR G. MURRAY, } At Law. No. 41124.
Receivers of the Baltimore & Ohio R. R. }
Co., a Corporation, Defendants. }

By leave of the court first had and obtained—

The plaintiff, Thomas Childs, heretofore duly appointed by this court administrator of the estate of John A. Merriman, deceased, and bringing into court his letters of administration, sues the defendants, John K. Cowen and Oscar G. Murray, who were heretofore, to wit, on March 2, 1896, in a cause pending in this court and known as equity cause No. 17197, duly appointed and have since qualified as receivers of the Baltimore and Ohio Railroad Company, a corporation operating a steam railroad and having an office and doing business in the District of Columbia, and have had from thence hitherto full possession, control, and management of said

railroad, together with the rolling stock, tracks, cars, locomotives, tenders, etc., appertaining to said railroad; sues the defendant receivers for that, to wit, on March 3, 1897, at the said District of Columbia, while said railroad was so under the care, government, and direction of said defendants, the plaintiff's intestate,

2 the said John A. Merriman, at or about eleven o'clock in the evening, was crossing the tracks of said railroad at or near a point where L street northeast crosses the tracks of said railroad in the city of Washington, in said District, at which point there was and had been for many years a regular railroad crossing, and while on or near said tracks at said point was, by reason of the carelessness, negligence, and improper conduct of said defendant receivers by their servants and employees, struck and mortally injured by a tender of said railroad which was being pushed or propelled backwards by a locomotive of said railroad, both of which said tender and locomotive were then and there under the direction and control of said defendant receivers and their servants and employees; that although there were and had been for many years railroad gates at said crossing which it was the duty of the said defendant receivers and their servants and employees to let down upon the approach of trains to said crossing so as to prevent persons crossing the tracks at such point, and although at the time of the wrong and injury complained of trains of said railroad were passing and repassing at said point with great frequency owing to the increase of passenger traffic over said railroad by reason of the inaugural ceremonies in said city of Washington on the day following, to wit, the fourth of March, 1897, thus necessitating greater care on the part of said defendant receivers and their servants and employees at said crossing, said gates were, by reason of the carelessness, negligence, and improper conduct of said defendants and their servants and employees, then and there up and unguarded by any
3 servant or employee of said defendant receivers, the servant or employee usually in attendance at said point having left his post of duty several hours theretofore; that although said tender was so being propelled or pushed backward by said locomotive at said crossing, the said defendant receivers and their servants and employees then and there carelessly and negligently omitted to place on said tender, as it was their duty to do, any light or lights to warn said decedent and persons crossing said tracks at said crossing of its approach; and, further, that said defendant receivers and their servants and employees then and there carelessly and negligently omitted to sound any bell or whistle upon the approach of said tender and locomotive to warn said decedent and persons crossing said tracks at said crossing of the approach of said locomotive and tender, as it was their duty to do; that by reason of the injury so received, plaintiff's intestate died on the day following, to wit, on March 4, 1897, and left surviving him a widow and four infant children as his sole next of kin, all of whom were dependent upon him for support and are now left in destitute circumstances. Wherefore the plaintiff says that by reason of the premi-

ses a cause of action has accrued to him as an administrator aforesaid, as by the statute in such case made and provided, and that he and said widow and next of kin have sustained damage in the amount of ten thousand dollars (\$10,000), for which sum and costs he brings this suit.

HENRY E. DAVIS,
CHAS. COWLES TUCKER,
Attorneys for Plaintiff.

4 The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

HENRY E. DAVIS,
CHAS. COWLES TUCKER,
Attorneys for Plaintiff.

Defendants' Pleas.

Filed June 25, 1897.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS	}	At Law. No. 41124.
vs.		
JOHN K. COWEN ET AL.		

For plea to the declaration filed in the above-entitled cause the defendants, John K. Cowen and Oscar G. Murray, receivers of the B. & O. R. R. Company, say they are not guilty as alleged.

HAMILTON & COLBERT,
Attorneys for Defendants.

5 *Joinder of Issue.*

Filed June 26, 1897.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS, Plaintiff,	}	At Law. No. 41124.
vs.		
JOHN K. COWEN ET AL., Defendants.		

The plaintiff joins issue upon the plea of the defendants.

H. E. DAVIS,
C. C. TUCKER,
Attorneys for Plaintiff.

Plea Puis Darrein Continuance.

Filed November 15, 1899.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS, Administrator,	}	At Law. No. 41124.
vs.		
JOHN K. COWEN ET AL.		

By leave of the court first had and obtained the defendants say that after the alleged claim accrued and after the last pleading in this action—that is to say, on the 30th day of June, 1899, in a cause pending in the supreme court of the District of Columbia, equity docket, No. 19864, wherein The Mercantile Trust Company is plaintiff and The Baltimore and Ohio Railroad Company is defendant—the defendants in this cause were directed to turn over to the Baltimore and Ohio Railroad Company the Baltimore and Ohio railroad, its property and assets, which was accordingly done, and that the said road, its property and assets, passed thereby absolutely from and out of the control, custody, and care of these defendants, and that these defendants are no longer the receivers of the said Baltimore and Ohio Railroad Company; that the said order of June 30, 1899, was passed after the decree of foreclosure made in said equity cause, on February 2, 1899.

HAMILTON & COLBERT,
Attorneys for Defendants.

7

Replication to Plea.

Filed November 15, 1899.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS, Administrator, Plaintiff,	}	At Law. No. 41124.
vs.		
JOHN K. COWEN ET AL., Receivers, Defendants.		

Comes now the plaintiff, and for replication to the plea of the defendants last pleaded in the above-entitled cause says that the certain order or decree in cause No. 19864, in equity, in this court, directing the defendants to turn over to the Baltimore and Ohio Railroad Company the Baltimore and Ohio railroad, its property and assets, was made by the court at the instance and upon the procurement of the said Baltimore and Ohio Railroad Company, and that in and by the said order and decree it was by the court adjudged, ordered, and decreed as follows, to wit:

“Comes now The Baltimore and Ohio Railroad Company, defend-

ant, by its solicitor, and presents to the court its petition, verified the twenty-ninth day of June, 1899, and Exhibits A and B therewith, wherein it shows to this court that the circuit court of the United States for the district of Maryland, the court of primary jurisdiction in these receivership proceedings, in the consolidated cases therein depending between the same persons parties herein, has, by

8 order or decree entered June 29, 1899, found and adjudged the said railroad company to be solvent and to be entitled to receive possession of all its railroad property and assets in possession of that court through the receivers in that the original receivership cause, subject to the conditions and reservations in said order provided, and prays this court to enter a like order in this cause directing the receivers of this court to turn over to the said railroad company possession of all and singular the railroad property and assets in their hands as receivers; and it appearing to the court that the allegations of the said petition are true and that the prayer of the same should be granted—

“Now, therefore, upon motion of the solicitor for the defendant petitioner, it is by the court ordered, adjudged, and decreed this thirtieth day of June, 1899:

“1. That upon conditions and subject to the reservations herein provided the receivers of this court be, and they are hereby, authorized and directed to turn over to the said The Baltimore and Ohio Railroad Company possession of all and singular the railroad property and assets in their hands as receivers of this court, and to execute and deliver any assignments necessary to effectuate the transfer of any property not capable of physical delivery, such delivery and transfer to be made as of midnight of June thirtieth, 1899.

9 “Said railroad company shall take the property upon the express condition that it will pay off and satisfy all debts or obligations incurred or to be incurred by the receivers which have not been or shall not be paid by the receivers and which shall be adjudged by this court or by the circuit court of the United States for the district of Maryland to be the proper and valid debts and obligations of the receivers, and that it will pay off and satisfy each and every debt and obligation of the said railroad company to any party, intervener, or claimant in this cause which the court has adjudged or shall allow and adjudge due and payable by it and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto, and also that the said railroad company will pay off and satisfy the amounts of all allowances, counsel fees, compensation due to the receivers or to any of the parties to these proceedings, as the same may be determined by agreement or by the court, and all costs, and this court expressly reserves the continued right to adjudge and declare what receivers' or corporate debts are due and ought to be paid by the said railroad company, with full power by its future adjudications to bind the property possession of which is delivered under this order. The court reserves full right and power to retake all or any part of the property herein di-

rected to be delivered or transferred to the said railroad company in case of the failure or neglect of the said company to comply with any order of the court in respect to the payment or satisfaction of any claim against the receivers or against the said company mentioned herein within thirty days after service of a copy of such order on the said company. The said company shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of
10 them, and the said company shall not be required to assume or adopt any contracts of the receivers which are by their terms limited to the term of the receivership or further than the receivers are obligated thereon. The court reserves full right and power to all or any part of the property herein directed to be delivered or transferred to the railroad company; also in case of the failure or neglect of the said company to comply with any order or decree of the circuit court of the United States for the district of Maryland with respect of any matter jurisdiction of which is reserved by that court in and by its order or decree entered June 29, 1899, (copy of which is filed herein as Exhibit B with said petition), whenever the said court of primary jurisdiction shall deem such retaking necessary to secure the enforcement of any provision of said order or decree.

"2. The receivers are hereby authorized and directed to make and file in said circuit court of the United States for the district of Maryland a final report of their receipts and disbursements, so far as the same have not already been reported by them, in accordance with said order of that court of June 29, 1899; and, upon the discharge of said receivers by the said circuit court of the United States for the district of Maryland after such final accounting, the receivers or the said railroad company shall have leave to apply forthwith for an order finally discharging said receivers in this cause.

"3. It is further ordered, adjudged, and decreed that all questions not hereby disposed of, including the adjudication and
11 settlement of claims against the receivers, the adjudication and settlement of claims presented by intervening petition, the provision for payment or security of such claims as are found just and payable, the determination of the amounts of all allowances, counsel fees, and compensation to the receivers, or to any of the parties to these proceedings, so far as the same shall not be determined by agreement, and all questions regarding the discharge of the receivers, are hereby reserved for future adjudication; and any party or intervener in these proceedings may at any time apply to this court, at the foot of this order, for further relief, and jurisdiction hereof is retained by the court for that purpose and for the purpose of enforcing all of the provisions of this order."

And the plaintiff says that the certain Baltimore and Ohio railroad in the said order or decree mentioned is the same Baltimore and Ohio railroad in the declaration herein mentioned, of which, as in the aid declaration alleged, the defendants at the time of the happen-

ing of the grievances therein alleged had full possession, control, and management, together with the rolling stock, tracks, cars, locomotives, tenders, etc., appertaining to said railroad, and which said railroad, at the time of the happening of the said grievances and until the passing of said order or decree, the defendants operated, and that upon and after the passing of the said order or decree the

12 Baltimore and Ohio Railroad Company in said order or decree mentioned, in conformity with the terms and provisions and subject to the conditions and reservations therein contained, accepted and received from the defendants the said railroad and appurtenances, and has since been and now is operating the same, and that the defendants, while so, as aforesaid, operating said railroad, greatly bettered the same and delivered the same to the said Baltimore and Ohio Railroad Company as so bettered; all of which the plaintiff is ready to verify.

DAVIS & TUCKER,
Attorneys for Plaintiff.

13 *Rejoinder to Replication.*

Filed November 24, 1899.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS, Administrator, Plaintiff,	}	At Law. No. 41124.
vs.		
JOHN K. COWEN ET AL., Receivers, Defendant- ant-		

Now comes the defendant- and for a rejoinder to the plaintiff's replication in this cause filed says that the certain order or decree in equity cause No. 19864 on the equity docket of the supreme court of the District of Columbia set up in said replication does not reserve and provide for the payment of the plaintiff's claim or of the claims of the class to which the plaintiff's claim belongs, but only provides for the payment of debts or obligations incurred or to be incurred by the receivers and which shall be adjudged by the supreme court of the District of Columbia, holding a special term for equity business, or by the circuit court of the United States for the district of Maryland to be proper and valid debts and obligations of the receivers, and that the payment of any and all claims or obligations against the receivers reserved and made payable under said decree are by the terms of said decree specifically reserved for future adjudication in said cause No. 19864 in the equity court, as aforesaid, and that no debt or obligation or claim can be inquired into or adjudicated as against the receivers except in said equity cause; and this the defendant- is ready to verify.

HAMILTON & COLBERT,
For Defendant.

[Endorsed:] At law. No. 41124. Thomas Childs, administrator, vs. John K. Cowen *et al.*, receivers. Rejoinder to plaintiff's replication. Copy for plaintiff's attorneys. Hamilton & Colbert, att'ys for def'ts.

14 *Joinder of Issue upon Rejoinder of Defendants.*

Filed November 27, 1899.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS, Administrator, Plaintiff,	}	At Law. No. 41124.
<i>vs.</i>		
JAMES K. COWEN ET AL., Receivers, Defendants.		

The plaintiff joins issue on the rejoinder of the defendants.

DAVIS & TUCKER,
Attorneys for Plaintiff.

Memorandum.

December 6, 1899.—Verdict for plaintiff for \$8,500.00.

15 Supreme Court of the District of Columbia.

SATURDAY, *December 30*, 1899.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

THOMAS CHILDS, Adm'r, Plaintiff,	}	At Law. No. 41124.
<i>v.</i>		
THE B. & O. R. R. Co., Defendant.		

It is ordered now, as of and on the 21st day of December, 1899, that the motion for a new trial be, and hereby is, continued until the next term of this court.

It is ordered that the term be prolonged for the period of thirty days for the purpose of settling exceptions in the above cause.

* * * * *

SATURDAY, *January 6*, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

THOMAS CHILDS, Administrator of the Estate of John A. Merriman, Plaintiff,	}	At Law. No. 41124.
<i>v.</i>		
JOHN K. COWEN ET AL., Receivers of the Baltimore & Ohio R. R. Co., Defendants.		

Now comes here Mr. Henry E. Davis and suggests the death of the plaintiff, who died subsequent to the rendition of the verdict

16 herein, which is not denied, and that he died intestate and
 that Adelaide M. Merriman has been appointed by the
 supreme court of the District of Columbia, holding a special
 term for orphans' court business, and has duly qualified as admin-
 istratrix *de bonis non* of John A. Merriman, deceased, and moves
 the court that said administratrix be substituted as party plaintiff
 in the place and stead of said deceased plaintiff, which is granted,
 and here ordered that said administratrix be, and she hereby is,
 made the party plaintiff herein, and that this cause stand revived
 and be in the same plight and condition as when the plaintiff de-
 parted this life.

ADELAIDE M. MERRIMAN, Administratrix *de* }
 bonis non of John A. Merriman, Deceased, }
 Plaintiff, }

v.

JOHN K. COWEN and OSCAR G. MURRAY, }
 Receivers of the Baltimore and Ohio Rail- }
 road Company, a Corporation, Defendants. }

At Law. No. 41124.

This cause coming on to be heard upon the motion of the defend-
 ants for a new trial, and the same having been heard, it is consid-
 ered that said motion be, and the same is hereby, overruled and
 judgment on verdict ordered.

Therefore it is considered that the plaintiff recover against the
 defendants eight thousand five hundred dollars (\$8,500) damages,
 as aforesaid assessed, together with the costs of suit, to be taxed by
 the clerk, and have execution thereof.

The defendants note an appeal to the Court of Appeals of the
 District of Columbia, in open court.

17 *Order for Appeal & Citation.*

Filed January 16, 1900.

In the Supreme Court of the District of Columbia, the 16th Day of
 January, 1900.

ADELAIDE M. MERRIMAN, Admxr., }

vs.

JOHN K. COWEN ET AL. }

At Law. No. 41124.

The clerk of said court will please enter an appeal to the Court
 of Appeals of the District of Columbia from the judgment entered
 in the above-entitled cause on the 6th day of January, A. D. 1900,
 and issue citation to the plaintiff (appellee).

HAMILTON & COLBERT,
Attorneys for Defendant- (Appellants).

18 In the Supreme Court of the District of Columbia.

ADELAIDE M. MERRIMAN, Administratrix d. b. n. of Estate of John A. Merriman, Deceased,	} At Law. No. 41124.
vs. JOHN K. COWEN and OSCAR G. MURRAY, Receivers of Baltimore & Ohio R. R. Co.	

The President of the United States to Adelaide M. Merriman, administratrix d. b. n. of estate of John A. Merriman, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office, supreme court of the District of Columbia, on the 16th day of January, 1900, wherein John K. Cowen and Oscar G. Murray, receivers of Baltimore & Ohio Railroad Company, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.	Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 16th day of January, in the year of our Lord one thousand nine hundred.
---	---

J. R. YOUNG, *Clerk*,
By W. F. WILLIAMS, *Ass't Clerk*.

Service of the above citation accepted this — day of —, 189—.

_____,
Attorney for Appellee.

[Endorsed:] No. 41124. Law. Adelaide M. Merriman, adm'x, vs. John K. Cowen *et al.*, receivers. Citation. Issued Jan. 16th, 1900. Served cop- of the within citation on —. ———, marshal. Service of the within citation accepted this 16th day of January, A. D. 1900. Davis & Tucker, att'ys for plaintiff (appellee). Hamilton & Colbert, attorneys for appellant.

19 *Memorandum.*

January 22, 1900.—Appeal bond filed.

Supreme Court of the District of Columbia.

MONDAY, *March* 26, 1900.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

ADELAIDE M. MERRIMAN, Adm'r'x, Plaintiff, }
vs. } At Law. No. 41124.
JOHN K. COWEN ET AL., Receivers, &c., Def'ts. }

Now again come here the defendants, by their attorneys, and tender to the court here their bill of exceptions taken during the trial hereof, and pray that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

20

Bill of Exceptions.

Filed March 26, 1900.

In the Supreme Court of the District of Columbia.

ADELAIDE M. MERRIMAN, Administratrix *de bonis*
non of John Merriman, Deceased,
vs.
JOHN K. COWEN and OSCAR G. MURRAY, Receivers
of the Baltimore and Ohio Railroad Company. } At Law. No.
41124.

Be it remembered that this cause came on for trial before the Honorable Chief Justice Bingham and a jury; whereupon, to maintain the issues on his part joined, Thomas Childs, then administrator of said John A. Merriman, deceased, and who has since died, and in whose place Adelaide M. Merriman, administratrix *de bonis non* of said John A. Merriman, deceased, has been substituted as plaintiff, called as a witness in his behalf JAMES O'DONNELL, who, being duly sworn, deposed and testified as follows:

I live at 1020 Florida avenue northeast, Washington, D. C., and am a laborer. In March, 1897, I knew John A. Merriman by sight only. I had seen him a good many times. I saw him last when he was crossing the railroad tracks just before he was killed. He crossed the west track of the Baltimore and Ohio railroad at 21 L street between Ninth and Tenth streets. There is a crossing at L street and there is room for only one team to pass through. There are two crossings there, one at L street and one at Florida avenue. They are about 200 feet apart. When I saw Merriman about to cross the track it was about twenty minutes after eleven at night. I was coming across the lot around the railroad from 9th and L. That was the shortest route I could take coming home. Merriman was coming from Florida avenue facing me. When I first saw him he was about fifty feet from the crossing, close to the track; he was coming south—coming right to the crossing. When I last saw him he was stepping onto the west track at the L Street crossing. At that time the train passed out—one came in and the other went out. When I got up to the crossing the train had passed, and he was lying right on the crossing. I put my hands under his head and raised his head up; he was right on the crossing between the two gates. There is a double track there; he was lying on the east side of the east track. When

I first saw Merriman he was coming down by the side of one of the small houses adjoining the tracks. I was approaching from the opposite direction on the same side of the tracks. When I last saw him he was right on the crossing. When I came up to him again after the train had passed out he was lying between two gates. The train going into the city was a long train.

When the train came into the city he was passing down alongside the tracks. When he stepped onto the track the other train was close upon him. When I got up to where he was lying the train

that was going out from the city had stopped at the Florida
22 Avenue crossing. That train consisted on an engine only and tender. I did not notice whether it was going head

front or tender front. I went to Merriman, raised his head, picked him up, and unbuttoned his collar. Then two railroad men came down there. One of them had a lamp, and they stopped and said, "Here he is." No one else was present at that time. At that time the train that was going into the city had passed in. It had passed in, and he was going across after the last end of it. He was going across. The long train had passed in before he had gotten to the crossing. I started down to find an officer to get the wagon to take him away. I left him in charge of the two railroad men. He was not conscious. I found three young men at 12th and Florida avenue, Clark, Peters, and Dillon. We came on back to where Merriman was lying. I could not find an officer. Then I ran to Ninth and H and left the three young men with him. I found an officer at Ninth and H. The officer came up, and they took him away in the patrol wagon. I saw Merriman put into the wagon. I did not go with him. When I first saw Merriman that night he was alone. I did not see any one else in that immediate neighborhood. The first persons I saw were the two railroad men.

On cross-examination the witness stated :

I had been downtown that night in the neighborhood of Seventh and the Avenue. I took the Columbia car at Seventh and New York avenue and got off at Seventh northeast. I crossed the tracks at Seventh street and went across at K street, and then crossed the lot to Ninth and L. I intended to cross at the L Street cross-

23 ing. When I first saw Merriman he might have been about 100 yards away. I do not remember whether the night was clear or not. There was some smoke left from the other train. I could see a man at twenty minutes after eleven 100 yards away. I had no trouble seeing him. When I first saw him he was at the side of the brick house between Florida avenue and L street, about fifty feet from the L Street crossing. At that time the incoming train was passing him. I do not know whether he observed the train or not. The gates were up at that time. I had been living in that neighborhood three years. I believe the gate-tender left at nine o'clock. At that time the gates were never lowered after nine o'clock. I saw Merriman after I started to cross the track. Just as he got in between—the train had passed, and he started right through the crossing. I was coming in the same direction that the

train was going. I did not see the train strike him. I did not see the blow struck, because he had almost crossed the other track. I know he was on the crossing when he was struck. It is not a fact that he crossed over the car tracks between the Florida Avenue crossing and the L Street crossing. When he was picked up he was not on the bank. They picked him up and set him on the bank. He was lying in a kind of a gully on the side of the track, at a point between the L Street crossing and the Florida Avenue crossing, between the two gates, about the center of the street. The place there is a commons, with a plank crossing over the tracks. You can drive through there. The space is not wide enough for two teams to pass, but a little wider than room for one team. I did not know Merriman to

24 speak to him. I had known him by sight four or five years. When I first saw him I did not know who he was. I discovered his identity after he was killed. I knew he was a fireman when I saw him coming down. I did not know where he lived. I knew he was a fireman with the No. 6 department, on Massachusetts avenue between Fourth and Fifth streets. I had never seen him there. I had been informed that he was a fireman. On the night of the accident I do not think he had his uniform on. I knew he was a fireman before the accident. I had seen him in his uniform before that. The accident happened about twenty minutes after eleven. I should say about 20 minutes. I know it was after 11; it was between eleven and twelve o'clock. When I first saw Merriman the incoming train was just about past him. The engine had passed where he was at. I could not tell how far it had passed, but I knew it had passed him; the last car was just about past him. Just before he got to the crossing the train had passed. From where Merriman was standing you could see in towards the city as far as Seventh street. It was not as much as a quarter of a mile. I do not know the distance. Florida avenue and Ninth street come together at that point. You could have seen two squares.

Further to maintain the issues on his part joined, the plaintiff thereupon read in evidence the deposition of FRANK P. SULLIVAN, as follows:

I have been in attendance as a witness for the plaintiff in this case for some days. I am residing in Brooklyn, New York. I am a pressman on the New York Journal. I expect to return
25 to New York before the trial. I cannot remain until the trial. In March, 1897, I lived at 900 Florida avenue, Washington. I was then a fireman at No. 10 engine-house and knew John A. Merriman. He was in No. 6 company. We were friends from childhood. Before March 3, 1897, he lived on 9th street between K and L streets, about two blocks from my house. I was with Merriman on March 3d, 1897, from nine o'clock in the morning until the time he was killed. We were both off duty that day. After sundown we came home to supper, about five o'clock. It was pretty nearly dark then. We left my house, and both of us went

across 9th street to his house. He lived on 9th street between K and L streets. We stopped at his house, and I believe he gave his wife a few dollars as she was going out. She was going out to take the children, but it was too cold, and she did not go, so he and I got on the H Street car and rode to 9th and New York avenue. We transferred there and rode to Pennsylvania avenue. We then walked down the Avenue as far as Third street. We then came back and stopped at Emrich's hotel, on the Avenue between 4½ and 6th street-. We went in and rolled three or four games of tenpins. We then walked up the Avenue as far as 9th, and between 9th and 10th we saw an engine company going by, and after that truck A came up, and Merriman said, "Let's get on and see where the fire is." This was about ten o'clock, between half past nine and ten. We ran and jumped on the truck. The foreman said, "Do not let any of those men jump on there," but Merriman replied, "We are members of the business and are just going to see where the fire is." We rode as far as 12th and the Avenue, where the truck stopped, and
26 we got off and found there was no fire. No. 6 Engine Company was coming back; that was the company with which Merriman was employed at that time. We both jumped on the No. 6 and spoke to the foreman and driver, who was named O'Brien. We rode down between 9th and 10th, when we jumped off. We walked as far as 9th street and up 9th to D street. We got on the car there and rode to 9th and New York avenue, and then transferred back home. We reached home about a quarter of eleven. Merriman did not come in my house. When we were coming out he wanted to get off the car at 9th street east and walk across, but it had been pretty muddy weather, and, as there was no pavement from 9th and K streets, we rode out to 11th street. We got off at 11th and walked down Florida avenue to my house. When we got in front of the house it was blowing pretty hard, and he said, "Let's get alongside of the house, where the wind won't strike us;" so we got on the side of the house. We must have been there over fifteen minutes, because the asylum clock struck eleven while we were standing there talking. He said, "It is 11 o'clock; we had better go home." I said, "All right," and I bid him good-night; so he passed down alongside the house and the fence and I went in the opposite direction to go in the front of the house. My house was about 12 feet from the railroad track; the side of my house was parallel with the track. Merriman and I walked down the side of my house together about twenty feet. There was a fence back of my house extending parallel with the track back to a shed, which was 12 or 15 feet from the rear of my house. The fence extended from the house to the shed. I went with him about half
27 way to the shed, walking along the terrace which rises above the track. There is a pathway there. When I left Merriman he continued down to the M Street crossing. By the M Street crossing I mean the street crossing that runs to the shed back of my house. There are two crossings near that point, about 20 yards apart. When I left Merriman he was walking to

the crossing back of my house—that is, the M Street crossing. When I last saw him I would say he was no further than 30 feet from that crossing. That was the last time I saw him alive; I saw his body next day. While I was standing there talking with Merriman, alongside of my house, I saw one long excursion train coming into the city. We were about to part, when he said, "Wait until this train passes." We waited until the excursion train went by, and then we bade each other good night and parted. After I went into my house I heard an engine blowing off steam in front of my house on the north side of Florida Avenue crossing. I went to the window and saw the engine standing on the opposite — of Florida avenue blowing off steam. The head of the engine was pointed towards the city. I am pretty sure there were some cars attached to the engine. I had heard no whistle blow or bell rung. When I left Merriman that night the gates at the crossing in the rear of my yard were up, and there was no watchman. The watch-box was closed, and no one was on duty. There was a watch-box on the opposite side from my house, which sets between Florida avenue and M street; it was nearer the Florida Avenue crossing, between Florida avenue and M street. The model offered in evidence represents

28 Florida avenue and the railroad tracks properly, but I know nothing of the pathway extending around the back of my house as appears on the model. The model does not show the fence and shed in the rear of my house; there was a fence that extended back to the shed in the rear of my house. I know nothing of the two pathways shown on the model and extending in a parallel direction on either side of the railroad track.

On cross-examination the witness said: I am 31 years old. I had been living in the house referred to just about a month before this accident happened. Mr. Merriman had been in the habit of visiting my house about once a week. That was the first time that Merriman had ever been in this particular house. I had lived next door to Merriman on 9th street between K and L streets. I was familiar with the railroad crossings at Florida avenue. I was born and raised there. I am pretty sure that Merriman was familiar with it also. He had been living in that locality on 9th street between two and three months. He had been living in the northeastern section of the city pretty much all his life. He was born and raised there. Before he moved to 9th street he lived on Parker street, between I and K, Second and Third streets, northeast. On the morning on March 3rd, I met Merriman about nine o'clock, at the corner of 9th and H streets. We walked up to his house. I went to change my uniform, and he joined me at the door of my house about half past nine in the morning. He had not taken anything to drink before I met him. We took a drink about 11 o'clock in the morning. We walked to the United States Library and from there out C street through Maryland avenue to Green's park, and from there to the house of a friend of mine on Maryland avenue.

29 On the occasion referred to I had a glass of beer and Mr. Merriman took a glass of seltzer and lemon. Merriman took a drink between nine and ten o'clock that night at

Emrich's. I was out with him all day. He had dinner at my house. He had three glasses of beer and one cigar at Emrich's. He did not take anything to drink the rest of the day. When I first met Merriman that morning our movements were as follows: We walked down 9th street east to H street; we got on the car and rode to 9th street west, and then transferred to Pennsylvania avenue; we walked to Darby's printing office, where I remained for twenty minutes. He did not come in with me. I joined him when I came out. We went down the avenue as far as the Capitol, through the Capitol grounds to the library, then through to Second street, down Second to Maryland avenue, through Green's park to Mr. Spaulding's place. We stayed there for a while, and Mr. Merriman then went to No. 10 engine-house. When I came out I joined him at the engine-house. We came back and went through to H street. We went down H to 11th, up 11th to Florida avenue, and then to my house. We then had dinner at my house. It must then have been about half past three. It took from half past nine in the morning until half past three in the afternoon to go to the places I have mentioned. Of course we stopped at plenty of other places. We were in the library over an hour. We had nothing to drink because we did not have any money. We were dead broke then. I borrowed \$3.00 from Mr. Spaulding, out of which I gave Mr. Merriman \$1.50, and of that he gave his wife \$1.00. After coming from the library in the morning I suppose we spent most of the time at No. 10 engine-house. After dinner we went to
30 his house, where we remained between half an hour and an hour; we left his house about half past four and went downtown to see the sights. We started home about half past ten. We spent the time between three in the afternoon and half past ten at night in walking up and down and in rolling ten-pins. We had nothing to eat between half past three and half past ten. After reaching my house we stood at the side of the house about midway. From that point we saw the gates at the Florida Avenue crossing. The gates were up and the watch-box was closed and there was nobody there to operate them. I did not see anybody in the watch-box and I naturally supposed there could be nobody there to operate the gates. I could not see how the gates at the M Street crossing were operated. I do not know whether the gates were all operated from the same watch-box. There was no other watch-box there except this one. I was talking with Merriman about 15 minutes. Before I left him I walked down with him to the middle of the fence which extends down to the M Street crossing and there I left him. At that time the gates at the M Street crossing were up, the incoming train had passed by. The gates at the M Street crossing did not go down. I know they did not go down. He was going towards the M Street crossing. He lived on the south side of the tracks and my house was on the north side. He had to cross over the crossing. There is no doubt about that. When I last saw him he was midway between the side of my house and the fence. The shed was about 15 or 20 feet back of my house.

The yard was a very short one. The shed extended right up to the H Street crossing. The shed ran clean up to the M Street crossing. You could stop a wagon and
31 throw coal into the shed. The shed extended as far as one end of the gate. I did not see the accident and did not hear of it until about half past two o'clock in the morning. When we got on the truck, on the Avenue, going to the fire we ran and got on. The foreman was Mr. Henry. We got off in front of the Palais Royal, and then turned around and came back on the No. 6 carriage. Mr. Merriman did not come in my house when we got back, about 11 o'clock. It was blowing pretty hard that night, not so cold, but disagreeable. It was a clear night. It was not raining. I think there was moonlight. It was not dark, although I won't say it was clear. I remember the deaf and dumb asylum was all lit up. We had no trouble in seeing the condition of things around the railroad tracks. We could see as good as we could any other night, but I did not notice whether it was moonlight or not. At that time Mr. Merriman was living on 9th street between K and L streets, on the west side of the street near L, where is a fence opposite my house, which fences in the grounds of the deaf and dumb asylum. The bank on the side of my house is about three feet above the level of the tracks. I saw an excursion train when I was standing there talking to Merriman come into the city. There was an engine and a large number of cars. There was another train that I saw passing while we were standing there. One train was going out and another coming in just before we crossed the track going over to the house where I lived. We crossed the track at Florida avenue. When we got up as far as the track there was a train coming into the
city. We waited until that train passed—that is, we were stand-
32 ing there talking, and while we were standing there talking, the excursion train came in. Both trains came in the same direction into the city. When the first train passed into the city we were about a half block from the tracks. At that time the gates were up. About twenty minutes after the passage of the first train the second train went into the city. After I had gone into my house I had gone upstairs and partially undressed. I saw an engine on the opposite of Florida avenue headed towards the city. There was no train; it was an engine. The engine was standing still. I did not see it move at all. I do not know whether it was coming into the city or going out. It was facing towards the city. The engine, to the best of my knowledge, had cleared Florida avenue. I did not hear this engine blow or whistle. I know that it did not blow. I did not hear it ring any bell. I said the engine was coming from the city. It looked like it was backing up to the round-house. It was standing still when I went to the window to close the blinds. I saw the engine when it was clearing Florida avenue, and it stopped on the other side of Florida avenue. When I first laid my eyes on the engine it was moving. I did not state in my direct examination that when I first saw the engine it was standing still. If I did, I was wrong. When I first saw the engine it was

clearing Florida avenue and stopped on the opposite side. When I went to the window and raised the window up, the engine was slowly moving. The crossing back of my shed is the M Street crossing. It is open and teams drive across the tracks. I do not know whether there are any boards between the tracks or not. There is a crossing back of the shed. I do not know what street it is, but it is a street that is open and goes back of my shed to
33 Florida avenue.

The plaintiff, further to main- the issues on his part joined, called as a witness GEORGE R. GLASCOE, who, being duly sworn, testified as follows :

I have been summoned in this case by the defendant and also by the plaintiff. I am sometimes known as Burt Clark—Clark being the name of my stepfather. I am a blacksmith, employed at the Washington navy yard, and have been there since April last. I was there for four years before that. In March, 1897, I lived at 222 C street northeast. I remember the circumstances of the accident on the night of March 3rd, 1897. I had known Merriman for fourteen or fifteen years. On the night of the accident I was at Twelfth and Florida avenue or K street. Mr. Peters, Mr. Dillon, and Mr. Manders and several more were with me. I heard of the accident from a young man named O'Donnell. We ran to the drug store to get the key for the purpose of ringing for the patrol wagon, but the drug store was locked up. We then went to the track and found Merriman lying on the inside. His head was south and his feet north. There was a lot of iron rails lying on the side, and he was in the pile. There were two men there ; one of them had a lantern ; one was a railroad man. I do not know about the other. Merriman was lying between the two crossings. You could see where he had been dragged. He was not over fifty feet from the L Street crossing. He was between the L Street crossing and the Florida Avenue crossing. His head was south. He looked to me as though he had been turned around and dragged, because his
34 clothing was all torn and his legs all twisted. We lifted him on top of the bank, and he said, " For God's sake do not pull me ; both of my legs are broken." He was cut very badly around the body. When I first got there he was lying beside the tracks on a lot of railroad iron, down in a ditch on the outside of the ties ; he was on the east side of the gutter or ditch towards the bank ; he was conscious. Some one had a lamp, and we looked at him ; he was full of blood, and, of course, you could hardly recognize a man in that way, it being dark. Some one held a lamp over him, and I asked him if his name was Merriman, and he said " Yes." Then he recognized me. I asked him where he wanted to go, and he said, To the hospital. That is all he said. Then the wagon came, and we put him in and took him to the hospital. I was the first one of my party that got to the scene of the accident. There were three of us. Then a tall young fellow named Darling came up ; he did not come before I did. We lifted him to the top

of the bank, and some one went to the box and got an old vest and threw it across his stomach; he was all cut open. Darling helped to put him in the wagon. There was an officer named Fisher there. I went to Providence hospital with him; he was conscious all the way; he was conscious after he got to the hospital, because the sister wanted to put him in the first bed, and he started to say something to me. When I first reached the point where Merriman was lying there was a locomotive standing there above the point where he was; it was very near the corner of Florida avenue, at the crossing, near the watch-box. The locomotive was on the south side of the crossing. The locomotive was not more
35 than ten feet away; it had a tender attached to it. The head of the locomotive was pointed towards Washington, the rear end of it towards Baltimore. I did not notice any light on the end of the tender pointing towards Baltimore. I never saw any. The only light I saw was the one the man on the ground had; that is the lamp. We took it from him and looked to see if we could recognize the man. There was a light on the front end of the engine, but there was no light on the rear and after I got there. What was there before I came I can't say.

On cross-examination the witness testified:

I was summoned by the plaintiff after I reached the court-house. I had a talk with one of the attorneys for the plaintiff and went to him for advice and asked him what I should do. Where I work if you do not report when you lose a day the chances are very hard to get back. That is the information I went to him for, to see if he would write down and see that the matter was attended to. When O'Donnell notified me of the accident I was at Twelfth street and Florida avenue. It was between quarter of eleven and eleven o'clock. It was a dismal sort of a night, right cool. It was cloudy, but not very cloudy. The spot where Merriman was found was very dark. I do not think you could see a man two squares off across those commons. There was nothing but commons around there. You might see that distance over the pavement where there would be gaslights; you could see a man's form. When I got to the place of the accident I could not see whether or not Mr. Merriman had been moved. I found him in between the two crossings. It seemed as though he had been dragged. The tail end of the engine was going towards Baltimore and the head was pointed towards the city. I am very certain there was a light on the
36 front of the engine. The engine was standing still when I got there. I did not see it in motion and I could not see in what direction it was going. It was dark and cloudy that night. When we heard that a man had been hurt we went to the drug store and tried to get in. We tried the box, but could not get it open. We then went into the back part of the drug store, where there was a barber shop. The man there told us that the key ought to be in the restaurant and went from there down to the railroad track.

On redirect examination the witness testified as follows:

I talked with one of the plaintiff's attorneys about this case a couple of years ago, and was summoned as a witness for the plaintiff. There was another gentleman, Mr. Kimble, who came to see me afterwards about this case, and I subsequently went to the office of the plaintiff's attorneys. On the night of the accident we were at Twelfth street. We came across the lot right back of the watch-box. Then we saw two men there. One of them had a lantern. We walked over and one of the men had Merriman's head between his legs. As we approached the locomotive and tender we were in a position to see any light on the back of the tender if it were there. The end of the tender was more than ten feet from the watch-box. I could not tell whether it was a hundred feet or not. There was no fence or gate or anything to stop the view of the engine. The engine was taller than the watch-box. Even if it had been beyond the watch-box we could have seen it. We could see the end of the tender very plainly. The engine was clear of the watch-box. It had not gone across the Florida Avenue crossing; it was standing still. The end of the engine was about twenty feet from the
37 watch-box, I should judge.

The plaintiff, further to maintain the issues on his part joined, called as a witness MAURICE J. DILLON, who, being first duly sworn, testified as follows:

I am employed as a laborer for the District government. In March, 1897, I was working at my trade as a plasterer. I lived on Prospect street, near Eckington. On the night of the accident I was at Twelfth and Florida avenue. We were at a dance. Clark and Peters and myself were together at the time. Clark is sometimes called Glascoe. We learned of the accident from O'Donnell. At first we tried to telephone to the police. We tried to find the police, but could not find one. Then we went down where Merriman was lying. He was between the track and the bank. His head was about two feet from the L Street crossing. He was in a ditch. There was a lot of loose rails there, and he was lying in the ditch at the time. We asked the man who was standing there to put the light on the man so that we could see who it was. After he did so Mr. Merriman spoke to Glascoe, and then we put him on the bank. He was conscious. Merriman was a stranger to me. At the time there was an engine standing there between the box and the L Street crossing. The end of the tender was right near the box—that is, the end of the tender was up to the box. The engine was pointed towards the city. There was a light on the engine, but I did not notice any light on the tender. There was a regular head-light on the engine at the time; that was the only
light I noticed. We just laid Merriman on the bank, and by
38 that time O'Donnell went for a policeman. He brought the patrol and the police up there with him. When I came up there were two railroad men standing near Merriman, but nobody else that I noticed. One of these two men had a lantern in his hand.

On cross-examination the witness testified as follows :

At the time of this accident I was at the corner of Twelfth and Florida avenue. I had been to a dance. We walked out of the dance and walked down as far as Twelfth and Florida avenue, and we met O'Donnell. He had walked from the place where the accident happened to Twelfth street and notified us that the man was hurt. We crossed to Twelfth and Florida avenue and took the south side and came right down. The engine was standing down this way from where Merriman was lying, very close to the crossing. He was lying between the two crossings. I should judge his head was about three or four feet from the L Street crossing. There are two gates there, and he was lying right at the end of one of the gates, about two or three feet from the L Street crossing, between the bank and the track. When we got there the engine was standing still. From the way I could judge, being on the track and facing towards the city, it was backing out from the city. I did not see it moving at all. I think it was a clear night. Standing at the point where Mr. Merriman was lying when I first saw him, a person could see a pretty good ways in towards the city. From what I could judge, there was nothing to obstruct the view. A man could see a couple of squares. I helped to put Merriman on the bank, but did not go to the hospital with him.

39 Whereupon the plaintiff, further to maintain the issues on his part joined, called as a witness WILLIAM A. LOWELL, who, being duly sworn, testified as follows :

I am a photographer. I took some photographs of the place of the accident. They correctly represent the location which they purport to represent at Tenth and Florida avenue, or Florida avenue between Ninth and Tenth streets. That crossing is known as the Kendall Green crossing.

On cross-examination the witness said there are three photographs. One of them was taken looking nearly south in towards the city ; that is photograph number one. The other is taken looking due west, possibly a little northwest on the other side of the railroad ; that is photograph number two. Photograph number three is taken looking directly west.

At this point it was agreed upon between counsel that the photographs referred to should go in evidence as representing the scene of the accident a few days before the trial, and that the only physical difference between the situation then and at the time of the accident is that some of the paths have grown over with grass since.

Whereupon the plaintiff, further to maintain the issues on his part joined, called as a witness WILLIAM HOWARD PETERS, who, being duly sworn, testified as follows :

I live in this District and am a horse-shoer. In March, 1897, I lived at 413 D street northeast. I remember the night of the accident. I was with Glascoe and Dillon on Florida avenue. I
40 learned of the accident from O'Donnell. We went to the place of the accident and found Merriman lying alongside

the track. He was lying at a point near the southeast gate of the L Street crossing and between L Street and Florida Avenue crossings. He was in the ditch and was lifted up and put on the bank. I did not see more than two persons when we arrived. The only others were the persons who were with me. They were Dillon and Glascoe. O'Donnell went up with us. I saw nobody else besides us three and the railroad men. If anybody else was there I did not know it. There may have been. When we reached the point where Merriman was lying I saw a locomotive there. It was just about even with the watch-box. The tender was just about even with the watch-box. The locomotive was pointing towards the city. The locomotive had a headlight on. I saw no light on the tender. We approached the scene of the accident from the east going towards the west. We could see the locomotive and tender when we were some distance up from the box.

On cross-examination the witness said Mr. Merriman was lying between the L Street crossing and the Florida Avenue crossing at a point not quite the length of the court-room from the L Street crossing. He was nearer the L Street crossing than the Florida Avenue crossing. The distance between the two crossings was about the length of this room and then half the length again, so that Merriman was lying a distance from the L Street crossing of about thirty-five feet. Twelfth and Florida avenue, where we were standing when O'Donnell informed us of the accident, is about three squares from the L Street crossing. We did not stop on our way to the scene of the accident except that we stopped at the corner to get

41 into the drug store. We did not go into the barber shop at all. I do not think Glascoe went into the barber shop. The three of us came on together. I do not know whether O'Donnell ran along with us or not. When we got to the place of the accident all I could see was two men. I do not think they had done anything towards removing Merriman out of the ditch, because he was lying there in the ditch when we got there, and then Dillon, Clark, and myself helped him up. The other two men were standing on the bank. I did not see one of them have Merriman's head in his lap. Merriman was conscious and conversed with us. I accompanied him to Providence hospital.

Whereupon the plaintiff, further to maintain the issues on his part joined, recalled JAMES O'DONNELL, who testified as follows:

At the time I saw Merriman at or near the L Street crossing I heard no whistle or bell sounded by the locomotive that was going out from the city. I did not hear any whistle or bell at any time. I do not know how fast the locomotive was moving. It was going pretty fast. It did not slow up as it approached the crossing. It kept on after it crossed. It stopped on another crossing. Looking at photograph number one, the witness put his initials, O'D., at the point where he found Merriman lying when he first went to him.

On cross-examination the witness said the engine going out from the city met the incoming train at L street after it had passed. The

train passed into the city, and then the engine came out. The train and the engine met down from the crossing. I could not tell how far down from the crossing, because I never measured it.

42 The point where the two engines met was about three times the width of the court-room. I did not hear any whistles or bells sounded on the train coming into the city. I did not hear any whistles sounded. I do not know that I could say that it did not sound. I do not know whether a whistle was sounded on that incoming train or not. I know there was no whistle sounded on the engine going out from the city, because I was closer to it. The other train passed right by me. I could not tell whether the whistle on that train was sounded or not, because I was too far up. That train was coming towards me and I was going towards it. I did not hear either of the trains blow. The engine that passed me did not sound its whistle after it passed me. I should say that Merriman was lying about two or three feet from the edge of the planks and at the L Street crossing.

Thereupon the plaintiff, further to maintain the issues on his part joined, called as a witness ADDIE M. MERRIMAN, who testified as follows:

I am the widow of John A. Merriman. He was killed in 1897. I was married to him eleven years. I have four children by him, the oldest a girl aged ten, and then a girl aged eight, a boy aged six, and the youngest, a girl, aged three. Mr. Merriman was a fireman in the employ of the District government for four years. He was earning \$67.00 a month at the time he was killed. He had no other means besides his employment as fireman and had no property. We lived in a rented house. I have no money or property of my own, and had not at the time my husband was killed. I have no means of living at all of my own, and my children

43 have no property. My husband was twenty-nine years old when he was killed. I will be twenty-eight my next birthday.

On cross-examination the witness said: I never knew my husband to be sick as long as I have been married to him. He weighed 198 pounds. He was in good health. He was not a tall man, but was a big, large, heavy man. Before he became fireman he was employed as a driver for the United States Express Company, and was so employed when I married him. I am living with my children now, except one child who is with my sister in New York. My sister is taking care of her because I was not able to do so.

Thereupon, further to maintain the issues on its part joined, the plaintiff called as a witness THOMAS CHILDS, who, being duly sworn, testified as follows:

I am a bookbinder. I am seventy years old. I am the father of Mrs. Merriman. I knew Mr. Merriman, who was a very large, powerful man—very healthy and strong; more so than most people. He was about 5 feet 9 inches tall. I am the administrator of Mr. Merriman's estate, duly appointed and qualified.

It was thereupon conceded by counsel that the defendants were appointed receivers of the Baltimore and Ohio Railroad Company, and by authority of that appointment were in the conduct of the affairs of that company at the time of the accident.

The plaintiff thereupon proved from the records of the Agricultural Department that at the time of the accident the wind was blowing twenty-six miles an hour from the northwest, and that the weather was clear.

44 And the plaintiff further offered in evidence the record in the case of *The Mercantile Trust and Deposit Company vs. The Baltimore and Ohio Railroad Company and others*, equity No. 19864, on the docket of the supreme court of the District of Columbia, in which case John K. Cowen and Oscar G. Murray were appointed receivers of said railroad company, and in which cause the decree which is set up in the defendants' last plea and in the plaintiff's replication thereto was passed.

The plaintiff thereupon recalled JAMES O'DONNELL, who testified as follows:

When I was walking down by the railroad tracks and first caught sight of Mr. Merriman there was nobody else in sight, and nobody with a lantern or flag or anything of that kind. There was nobody at the crossing.

On cross-examination the witness said there was nobody between the crossing and Florida avenue. I could see if there were. I was up the track. The distance between the point at which I was when I first saw Merriman and Florida avenue was one hundred yards—that is, he was one hundred yards from me. The distance between the L Street crossing and the Florida Avenue crossing was about one hundred feet. I saw the train coming in, but could not see on the other side of the train.

Thereupon the plaintiff, further to maintain the issues on his part joined, called as a witness WILLIAM J. MANDERS, who, being duly sworn, testified as follows:

I am a paperhanger. I live in the District of Columbia.
45 In March, 1897, I lived on O street between Twelfth and Thirteenth streets northeast. I did not know the deceased. I was at the scene of the accident a little while after it occurred. I learned it from the police. I was with the crowd, the first crowd, that went there. They got there a little before I did. They came back and told me about it, and I went right over. I was with Glascoe, Peters, and Dillon. They went to the scene of the accident and then came back, and then I went over. I saw Merriman lying on the bank, about ten feet from the track, near the L Street crossing. He was lying on this side of the gate, on the bank between the watch-box and the gate. I did not notice the locomotive there. I paid no attention to it. It must have been about quarter after eleven when I got there. I got there about five minutes after Dillon, Peters, and Glascoe got there. I saw Mr. O'Donnell there.

Mr. Clark, and Mr. Peters, and Mr. Nevin, a policeman, were there I do not recollect anybody else. There were but very few there when I got there. After the patrol wagon came, there was quite a crowd. Between the time I first got there and the time the patrol wagon came up a number of others came. I do not know whether there were any railroad men there or not.

On cross-examination the witness said: The distance between the planks at the L Street crossing and the point where I first saw Mr. Merriman was about fifteen feet; the point was between the gate and the box. I was at Twelfth and Florida avenue when I first heard of the accident. O'Donnell came and told us about the accident, but I remained behind a few minutes. Somebody came down
46 and said there was a man hit at the crossing, so I ran down and got there about two minutes after I was told by this other party and about five minutes after my companions got there. I saw Merriman lying between the gates and the watch-box. I do not recollect seeing any engine there at all. Merriman was conscious when I got there. He recognized Mr. Clark.

The plaintiff thereupon offered in evidence section 2 of chapter 73 of the Laws of the Legislative Assembly of the District of Columbia, passed on the 23rd day of August, 1871, as follows:

"And be it further enacted, That the Baltimore and Ohio, Alexandria and Washington, Baltimore and Potomac, and National Junction Railroad Companies are hereby directed and required to keep in the daytime, at every point where any public street crosses the railroad track or tracks of said companies, a person stationed with a red flag, and in the evening, until arrival and departure of the last train at night, at all the street crossings, a person with a flag and lighted lamp or lantern with red glass, to give warning of the approach of the locomotive engines and railroad cars, of any descriptions, of said companies, under the penalty of ten dollars for every time any locomotive engine or railroad car shall pass at any such crossings, without such persons being stationed and such warning being given, to be forfeited and paid by the said companies, or the engineer or conductor in whose charge such locomotive engine or railroad car may be severally and respectively."

47 The defendants thereupon, to maintain the issues on their part joined, called as a witness ISAIAH STEVENS, who, being duly sworn, testified as follows:

I am an engineer on the Baltimore and Ohio road, and have been for twenty-nine years. I have been in the railroad service for nearly thirty-five years. In March, 1897, I was running an engine. On the night of March 3rd we left the depot in Washington for Baltimore about eleven o'clock. We had an engine and tender and nothing else. We were going to Baltimore. We did not run over six or seven miles an hour, because we had no train or anything. We were running extra. As we approached Florida avenue

I did not see anything at all until I saw this man fall over from the track. When I first saw him the engine was against him. He was falling over from the track. We were running headforemost. We had a head-lamp and two signal lamps or bull's-eyes on the front of the train. These signal lamps were right on the end of the boiler on each side. They are white lights. We had two headlights on the rear of the train on each corner of the tender. These are called "markers," to indicate that that is all the train there is. We put them on the hind end of the train, and it means that the point where they are located is the last of the train. When I first saw the decedent I was right between the two crossings, which are right close together. He was about opposite one of the gates. I did not see him before. There was nothing to obstruct my view as we came along there. I was keeping a lookout, as I always do. I was on the right side of the engine, and had on the engine with me two brakemen and a fireman. We were going to
48 Baltimore. After I saw that the man had been struck I stopped right there, but the tender was past the man, or about past him. I stopped and went and had a few words with him, and we picked him up and laid him on the bank, the fireman, one brakeman, and myself. He talked. We asked him where he lived, and he said, "In Washington." I or the brakeman asked him his name, and he said that was all right, and that is all that I recollect he did say. While we were there not a soul came up. The brakeman, the fireman, and myself were the only persons there. I had no lantern with me when I went back. We did not need any lantern. We did not remain a great while after the accident happened. One brakeman went back in case anything should come behind us. One brakeman went down the track towards the city of Washington with his lantern for the purpose of keeping any other trains from running into us. The other brakeman, the fireman, and myself attended to the injured man. At the time there was a train coming into the city. That train passed us right at this crossing. That train had a number of cars attached to it. Mr. Merriman was struck between the L Street crossing and the Florida Avenue crossing, at a point nearer the L Street crossing.

On cross-examination the witness said: I first took charge of that engine at Cumberland, and brought in into Washington over the Metropolitan branch, and then took it out on the Washington branch towards Baltimore. I was ordered to take the engine there because they needed it there, I suppose. We turned the engine on the turn-table at the depot. We
49 used the turn-table that night. We did not use the "Y" that night. I remember distinctly that we used the turn-table. If the engine had been turned at the "Y," it would have been turned around. There are three places where it could have been turned. If it was not turned at the "Y" and not turned at the depot, it could have been turned at Trinidad, beyond Kendall Green and beyond the Florida Avenue crossing. The station was not very much crowded with cars that night. They had pulled the

cars out. I could not say that there were more cars than usual. I could have turned my engine at Trinidad and gone directly on to Baltimore without returning to Washington, but I did not do so. I do not know of any difficulty I had in getting my turn at the turn-table at the station on account of other engines. There were a good many cars there on an occasion like that, but the cars were not in my way when I went to turn around. When we approached the L Street crossing we were not running over six or seven miles an hour. There were four men on the locomotive. When I first saw Merriman he was not directly on the L Street crossing; he was between the two crossings. He was six or eight or ten feet from the crossing—say ten feet from the crossing—right by some bars of iron lying there. He was not on the track when I saw him. He was being pushed over. The engine was against him and was pushing him over. When I first saw him the pilot of the engine was against him. When I first saw him he was falling over to one side, outwards. At that moment when he was falling over I supposed the pilot had struck him. After he was struck I stopped before the

50 tender passed him. The engine and tender are thirty-five or forty feet long. I went about thirty feet after striking him. Before I stopped I did not go up to Florida avenue and bring my engine back. I am sure of that. That night we were "running light," some call it "wild." It is a train that it not flagged by any other train. Gates are put down at crossings for such engines, but they are not flagged by other trains. If there were two or three trains running from here to Baltimore, running all on one section, the first one, second one, &c., would be carrying green flags or green lights of a night. I had no instructions to reach Baltimore at any particular hour and no instructions as to speed. I knew of no train that was to follow me. When I sent the brakeman back to flag any train behind me it was simply a precautionary measure. We do that anywhere we stop, at any place or time. I had no information about any train following us. I remember nothing else that Merriman said save that he lived in Washington. I think the brakeman asked him the question. One of the brakemen had a lantern. He went back to look out for anything that might approach on that track. I could not tell where there was any other lantern. The incoming train passed my locomotive just about that crossing there. It did not cross at Florida Avenue crossing because we did not cross the outer crossing. It crossed just about at the L Street crossing. It crossed just about the time I struck this man. I could not tell whether the train was a

51 long one or not. I know an engine came along there with a train. I do not recollect of having seen O'Donnell. I do not recall that he was there when I went to Merriman. I won't swear that he was not there. My best recollection is that the brakeman, the fireman, and myself were all that were there. I do not recollect seeing O'Donnell. The incoming train and my engine met about the L Street crossing. It might not have been right on the crossing, but it was right close to it. If it was not there, very

close to it. My locomotive and tender remained at the scene of the accident eight or ten minutes after the accident and then we went on to Baltimore. I saw a policeman there and a flagman from the lower crossing nearer the city. I went away because these men said they would take charge of the injured man; that we could go on and get out of the block. I do not know that anything was said about arresting me. If there was I do not recollect it. The trainmen did not discuss the possibility of being arrested, and that was not the reason we went away so quickly.

On redirect examination the witness said: We were there eight or ten minutes after the accident. I saw a policeman there, but do not remember talking with him. If, in coming down the Metropolitan branch from the west, our train had gone around the "Y" and backed into the station, the engine would have been headed towards Baltimore. Another way of getting our engine headed for Baltimore was to take the turn-table at the station. That turn-table is right at the depot, on the south side of the depot. There were no passenger cars on that turn-table; not when we

52 were on it. The "markers" on my engine were green on the hind end and white on the front end. When we run extra, that means there is no train or flagman at all. We do not run on schedule time. By saying that we were in a "block" I mean there is a block signal telegraph office or target. They won't leave one in unless another is out. The far end of that particular block was at Trinidad; the other end is at Metropolitan Junction. Whenever a train or engine is stopped at any place on the road, the invariable custom is for the brakeman to leave the train and go back to flag any train or anything that might come along. On this particular night I did not use the "Y." The number of my engine was 1402.

The plaintiff, by leave of the court, further to maintain the issues on his part joined, offered as a witness DANIEL CURRY, who, being duly sworn, testified as follows: -

I am a clerk in the executive office of the District of Columbia, where I have been for ten years.

Witness thereupon produced the records of the Commissioners of the District of Columbia, containing the police regulations in force at the time of the accident in question, as follows:

"That section 31 of article 10 of the police regulations of the District of Columbia is hereby amended by adding thereto, after the word 'lanterns' in the last line thereof, the words 'over any crossing or intersection named herein, unless the same is guarded by safety gates, as provided in this and the succeeding section hereof,' so that the said section shall read as follows:

53 "SECTION 31. All grade crossings or intersections of any steam railroad tracks with streets, avenues or roads, shall be made safe by the company owning or operating such road, by gates and electric bells or other means and appliances approved by the Commissioners of the District of Columbia. Between sunset and

sunrise of each day a headlight or other equivalent reflecting lantern, or a hand lantern in the hands of an attendant, to give due warning to persons near or crossing steam railroad tracks of the approach of trains, locomotives or cars, shall be displayed upon the advancing end of every train of steam railroad cars, and of single steam railroad cars and locomotives not in trains, when moving, in the District of Columbia. It shall be unlawful for any person to set in motion, run or operate any train, of railroad cars, single railroad car, or locomotive, without the said display of such lights or lanterns, over any crossing or intersection named herein, unless the same is guarded by safety gates, as provided in this and the succeeding section hereof."

That regulation was made September 10, 1896, and was not changed up to and including June 30, 1897.

Cross-examination waived.

The defendants thereupon, further to maintain the issues on their part joined, called as a witness JOSEPH HEALEY, who, being duly sworn, testified as follows:

I am a telegraph operator, employed at the B. & O. station in Washington. My office is just outside of the train shed at
54 the corner of North Capitol and D streets. I keep a record of all trains which arrive and depart from the city and report the time, the number of cars, and other information of that kind to the train dispatcher. I make the record myself. On the third of March, 1897, I was working at the office at night. The record that I made at that time was as follows: "Baltimore and Ohio railroad, John K. Cowen and Oscar G. Murray receivers. Report of the time of the east-bound trains, March 3rd, 1897." The first record we have on engine No. 1402 on that date was coming from the west with a special train known as the 6th section of No. 6. It arrived in Washington at 9.30 in the evening. The record is as follows: "6th section, train 6, No. 1402, arrived at 9.30 p. m., 8 cars. No signals. Turner, conductor; Stevens, engineer." The next record we have of that engine is of its leaving Washington, going east as an extra, as follows: "Extra, engine 1402, left Washington 10.56 p. m. No cars. White signals. Isaacs, flagman; Stevens, engineer." When a train is not scheduled and is not run usually we provide for it by running it as what we call an extra. To do that it is required to put up white signals. Then all our employes know that it is not a scheduled train, but an unusual train running as an extra. These white signals consist of white lights or white flags displayed on the front of the engine. Flags are used in the daytime and lanterns at night. These signals are always on the front of the engine. I made that record at the time the engine left—immediately on the transaction taking place. I saw the train pass out and made the record at the time. The turn-
55 table is located on the corner on North Capitol and B streets, a distance of four or five yards from the telegraph office. There is no other turn-table at the passenger station. White

signals are invariably carried in front of the engine on the front part of the boiler. I have no recollection of this accident. I made the report of which I testify from a personal observation of the engine at the time it passed it.

No cross-examination.

Thereupon the defendants, further to maintain the issues on their part joined, called as a witness CHARLES H. CUTSAIL, who, being duly sworn, testified as follows:

I live in Baltimore; am a fireman on the B. & O. road; have been such for 11 years; was employed on March 3rd, 1897, by the B. & O. I recollect this accident. The engine came from the West in the first place. It arrived in Washington in the afternoon with a train from Cumberland. We left Washington that night a few minutes after 11 o'clock, going to Baltimore. There were no cars attached to the engine. Myself, the engineer, and two brakemen were on the engine. The engine was running head front. We got orders to run extra from Washington to Baltimore. We moved out very slowly, clear out to where we struck this man at the avenue. We were running about six or eight miles an hour, not over eight miles at the outside. We were running along very slowly. We were very tired, all of us, and we just took our time running extra on no schedule, with nothing to hurry us. We had all night on the road,

so far as that is concerned. As we approached Florida
56 avenue, running very slowly along there, the engineer said, "I believe we struck a man." Just as he said that I saw something roll out in front of the pilot of the engine. We kind of pushed him. We did not hit him. We just kind of pushed him, and he rolled up to the side. We stopped and, sure enough, we had struck a man. After striking him the engine hardly moved the length of this man. We threw on the emergency brake, and hardly ran the tender past him. The pilot of the engine had just about reached the Florida Avenue crossing; not any further than that. We got down, together with both the brakemen. One brakeman went back to flag, and I and the other brakeman and the engineer carried the man over from the bank. When I first came back and saw him he was lying almost between the two crossings; right beside a little watch-box, between the watch-box and the gate, near the center of the two crossings. When we placed him on the bank we tried to find some one. The first man on the scene was a policeman, or somebody else with him. After we got several more people, as it was a very busy time and we had to get out of the block as soon as possible, we moved on. There was no threat made by anybody to arrest us. It was not raining that night.

On cross-examination the witness said that for nearly 25 minutes there was no one there except the four trainmen, one of whom went back to flag. We tried to make Merriman speak, but he kept on saying "That is all right," and that is all we could get out of him. He did not tell us where he lived; he mumbled something, but it seems to me that he said he lived in Washington. I think he

also told us not to take him home; that his wife was sick.
57 He said also that he did not want to go to the hospital. I did not see Mr. O'Donnell there at that time. I am positive of it. The length of a tender and engine is about 35 or 40 feet. The distance between Florida Avenue and L Street crossing is 50 feet or a little more. The engine stopped just as the pilot reached Florida avenue. The engine and tender did not have to move back towards the L Street crossing. We turned our engine at the turn-table in Washington. I was with him when it turned. I do not think I left the engine between the time we came in from Cumberland and the time we started to Baltimore. We got to Washington after dark in the evening. When we got from Cumberland the brakemen were not with us. They did not belong to that crew. I do not remember whether the gates at the L Street crossing were up when we got off the locomotive. That was a rush at the time, and these two brakemen were lying in Washington, and wanted to get to Baltimore, and they were sent over with us dead-head. We had to have a brakeman anyhow, and one of them was to do the flagging, and they sent them over in that way. These men lived in Baltimore. Our engine was wanted in Baltimore. We were going head on. To bring a train back from Baltimore we would have to turn again at the turn-table there. If we started with the tender first from Washington we would not have had to turn at Baltimore. We would have to go to Riverside. We always have to go to Riverside, and the engines are run from the round-house and put on the turn-table, and are put in proper position to go to Camden and get a train. If we went tender first to Baltimore
58 we would have had to go to Riverside anyhow. When we go from here to Baltimore, if we have not any crew or coach behind us, we do not go into Camden. We keep straight on to Riverside and then we stop off on the fire-track. We go to our homes and they call us again for a certain train. The fire-teams take the engine and repair it, and when we are called we step on again. When we go over from here to Baltimore we do not go to Camden station with a light engine, we go to Riverside, where the engines are kept in the round-house. We run right straight down on the fire-track, and then we go back to the round-house. We back from Riverside to Camden station. It is the only place we run backwards. Then we couple on to our train so that we will be in proper position. We always take our engine to the round-house and wait until we are called. We never go to Camden station with a light engine unless we have orders.

Thereupon the defendants, further to maintain the issues on their part joined, called as a witness EUGENE F. ISAAC, who, being duly sworn, testified as follows:

I reside in Baltimore and have been employed by the B. & O. road for eight years, and was so employed March 3rd, 1897, as a brakeman. On that day I came from Baltimore in the evening, and returned to Baltimore about midnight. I went back as a flag-

man on a light engine. When the engine started from the station at Washington it was running head front. The engine on the front had two lights and two headlights. There were four men on the engine—the engineer, two flagmen, and the fireman. The number of the engine was 1402; it was a passenger engine. We were not moving rapidly, and we were not running on schedule; we were extra. There were two red lights on the back of the engine at the tender. They indicate that that was the end of the train. As we approached Florida avenue I was on the left-hand side of the engine, on the fireman's side. I did not see the man on the track at all. The first thing I knew I heard the engineer say that he had struck a man. I picked up my lamp and started back to flag. I could not say how far the engine went towards Florida avenue after the engineer said he had struck a man. I do not think it went beyond the crossing. I did not get off the engine until it had stopped. After I had started back to flag I came back with the policeman whom I had notified. When I came back with the policeman the engineer and fireman and the other brakeman were around the injured man. I do not recollect seeing anybody else. I did not stay there over a couple of minutes, because I went back a second time to flag any trains that might be approaching. I remained back flagging until the whistle blew for me. I then got on the train and went to Baltimore. When I first saw the injured man he was lying in the gutter, about six, eight, or ten feet from what they call the Florida Avenue crossing. He was lying between the watch-box and the gates.

On cross-examination the witness said: When I left the locomotive first the other brakeman had gotten off the train. I left him with the injured man, and I continued on down the track. I remained down probably ten minutes. It might not have been that long. I walked down below the next crossing, three or four hundred feet away. It was the next crossing below the crossing in question. When I returned with the policeman the other brakeman, the engineer, and the fireman were standing around Mr. Merriman. There might have been somebody else there, but I do not recollect it. After my return it was probably ten minutes before the engine went to Baltimore. After leaving the policeman where Mr. Merriman was I went back to flag the second time, and I remained away not over ten minutes, and came back by myself. When I got back the men had gotten on the engine, and I got on and we went away. We left before Merriman was taken away. He was lifted from the gutter on to the bank. I think there were some railroad irons in the gutter. I was not there when they lifted him up. I was not on the engine any length of time before it started away from Washington. I heard nothing said in the crowd about having the engineer arrested. That was not the reason we started on to Baltimore.

Thereupon the defendants, further to maintain the issues on their part joined, called as a witness MILLARD F. SHAEFFER, who, being first duly sworn, testified as follows:

In am a brakeman on the Baltimore and Ohio road, and was so employed in March, 1897. At eleven o'clock that night I was brakeman on engine 1402, going from Washington to Baltimore, where I lived. I got on the engine in the Washington yard. The engine had a headlight and two white lights in front of the engine and two red lights on the tender as markers. We left the yard about 11 o'clock; perhaps a few minutes before or a few minutes after. The engine was headed towards Baltimore. We were running at the usual rate of speed going out of the yard. It has been so long that I hardly remember what did happen, but as we approached the Florida Avenue crossing, as they call
61 it—I am not familiar with either of the crossings in that part of the town—the engineer said we struck a man. He put on the air and stopped as soon as he could. As soon as he stopped, the other brakeman and myself got off. He went back to flag and I went and picked the man up. He was lying between the two crossings, about ten or fifteen feet from the first crossing as you go out. The fireman, engineer and myself picked him up. Nobody else was present at the time. I remained with him until the officers and gate watchman from the lower crossing came up. At that time there were several other persons present. I do not know who they were. I think the policeman and a watchman came up first, and after that several others. We remained there about twenty minutes. When I left, Merriman was in the watchman's charge. As soon as the engineer said he had struck a man I did not stop to look and see whether we had passed the crossing or stopped between the two crossings. When I got back and picked the man up he was still alive. He was lying about ten feet from the nearest crossing, between the two crossings. He was lying between the outside rail and the cross-ties, right up by the side of the rail. He was conscious. We then got on the train and started towards Baltimore. When we got to Baltimore our engine went to Riverside, east of Camden station. We did not go out to Riverside, but the engine went to Riverside; but we two men got off and walked to Camden station. The fireman and engineer remained on the engine.

On cross-examination the witness said: When I got on the engine at Washington it was in the yard, two or three yards from
62 the station. The tender was facing the turn-table. The engine was off the turn-table, headed for Baltimore. When we reached the scene of the accident I was in the cab of the engine, two of us on each side. I did not see the man when he was struck. I did not know it until the engineer informed me. We then both jumped off and went back. I cannot say exactly how far we had passed the man before the engine stopped. It has been some time ago and it was dark, but we hurried back as soon as we could. I could not say how far we had to run back. I suppose it was 100 or 200 or maybe 150 yards. I was the first who reached the injured man.

Mr. Isaacs was with me. He went back to flag. He had a lantern. He did not stop to look at the man at all. When I started to raise his head up he asked me where he was. He did not say where he wanted to be taken. I asked him where he was from. He asked me where he was at, and I told him I did not know. I told him he was on the railroad track, but near what street I did not know. I asked him what his name was. He said, "I know my name." I then said, "I know that you know your name, but tell us what your name is; we want to know where to take you to." He would not tell us. He did not tell anybody what his name was while I was there. When I asked him what his name was he said he did not know his name—he did not know his name. Then the engineer came down, and I told him to go to the telegraph office and report that we had hit a man, and the police would send a wagon to take him away. Then I said to the injured man, "Won't you tell us your name?" He then said, "My name is Merriman." I asked him where he lived, and he tried to mumble out something, but I did not understand what it was. Then the engineer and fireman and myself carried him up on
63 the bank. We asked him if he wanted to be taken home, but he did not answer. He said he did not want to be taken to the hospital. I do not think he said anything about going home. When we started to get on our engine to go to Baltimore the gate watchman and two or three other men were there. I did not know them. I am certain I helped to put Merriman on the bank. The engineer and the fireman helped me. The injured man wanted to get up, but I told him he could not do so because his leg was broken. When we put him on the bank we got on the train and went to Baltimore. We left him in the care of the watchman. The watchman's post was at the crossing below—that is, the crossing before coming to the crossing at which the man was struck. I do not know whether that watchman had a lantern or not. Isaacs had a lamp and I had one. Nobody asked me for my lamp. I sat it down on the cross-ties and got hold of the injured man's head and raised it up. As soon as I did that he asked me where he was. When I lifted his head up the light from my lamp shone on his face. I could see his features and could tell that he was a white man. He was lying on the outside of the rails between the ends of the cross-ties and the outside of rail of the track. He was not between the tracks, but was on the outside of the track. He was not in the gutter. I did not see any loose rails lying alongside the track in the gutter. I do not know whether the watchman came up with the policeman or not. They both came there about the same time. That was after Isaacs had gone down the track with his lantern. He was left there with the watchman and the policeman. I do not know whether or
64 not the watchman had a lantern. The brakeman had one. The brakeman came up with them. They all three came back together. The brakeman had a lantern. I did not see the watchman as we passed the crossing at which he was

stationed. We were talking together in the cab. I remember that a train passed us a few seconds before we approached the crossing. The engines passed each other before we got to the crossing; I suppose 150 yards before. I do not remember how many cars were in that train. There were a good many trains coming and going in both directions that night. There were a number of excursion trains coming into Washington at that time on the B. & O. I do not know whether this was an excursion train or not. It was a passenger train. Roughly speaking, it passed our engine about 150 yards before we reached the crossing at which the man was struck. At the time the engineer said he had struck a man, the ingoing train, I think, had passed out of sight around the curve. As you come into the city there is a curve or bend there, and to the best of my knowledge the ingoing train was out of sight at the time the engineer said he had struck a man. I did not look to see whether the train had gone out of sight or not. Nobody blew the whistle of the locomotive I was on. The whistle was not blown. I do not know whether the bell was rung or not. I do not think the bell was rung. The gates were up and there was no watchman there. When the engineer called out that he had struck a man we had passed the first crossing. We had passed it just as quick as a man could say. At that crossing there was no watchman, and no lights; the gates were up. After passing that first crossing, I think our engine went as far as Florida
65 Avenue crossing. There was no man there and I do not remember seeing any light there, and the gates were up. I did not know the policeman that came up with the watchman. I did not notice whether the gates were up or down at the crossing below where the watchman was stationed. I did not take particular notice. The policeman told us to stay at the spot of the accident until he came back. He then went to get a wagon. When we left, we left the watchman to take care of the man. We were in the block and did not want any other train in the block until we cleared out. Then we got on the train and started to Baltimore. The policeman said nothing about arresting any of us. He told us to stay there until he came back. I do not remember any of the trainmen saying anything about getting off before the policeman returned. I do not remember that any of us had any conversation about it. I believe that I said if we stayed there we might get "pinched," and we might have to stay there all night. They might lock us up until morning. I do not know to whom this was said, and I do not think any reply was made. After that we got on the engine and went away before the policeman came back. There were two red markers on the tender. The usual color was red. Red is used as a danger signal. Green is used as a marker on the train. When green is put on the front of the engine it shows that there is another train out of the same class. When it is put on the rear of the train the markers show green on one side and red on the other side. Green markers show that a train is following us. If a train started from Washington to Baltimore at night

the markers on the end of the train would show green to the engineer and would show red in the other direction.

66 The glass that is turned towards the engineer is green, and the glass that is turned towards the road is red. If the engineer looks out and catches sight of the green light he knows that his train is unbroken, the red lights showing to men along the road or informs them that the train is just as it left the point of departure. Our engine had these red lanterns. They had no green in them at all. They are used as a warning to keep any other train from running into it. Any railroad man seeing an engine going along that way would know that it was a light or wild engine. I did not know any of the men besides the watchman who were there when I left Mr. Merriman. I did not know the watchman. I knew he was a watchman, but did not know his name. I did not know the policeman or any of the strangers who came up there. I think I knew a man named Rosseter, a member of the fire department. I think he was at the hook and ladder department above the B. & O. station. I had a talk with him the next morning. I asked him how Mr. Merriman was and he told me that he was dead. I replied to him that I expected the poor fellow to die. I did not tell Rosseter how the accident happened. I came back to Washington next day. There was no effort made to arrest me, and I did not try to conceal myself.

Thereupon the defendants, further to maintain the issues on their part joined, offered as a witness JOHN F. C. NEBB, who, being first duly sworn, testified as follows:

67 I am a police officer, and have been for a little over eight years. I remember the night of the accident. When I first heard of the accident I was on 9th street between H and I streets northeast. A young man named Dowling informed me of the accident. Dowling and myself went to the scene of the accident, and when I got there I observed the injured man lying on the bank on the east side of the track. There were several men there. I could not state who they were, but I know Mr. Dalrymple, the officer, was there. Mr. Johnson, the gate-keeper at the 7th Street crossing, was there. I know Mr. James O'Donnell, but cannot remember that he was there. I do not remember seeing him or Clark or Peters or Dillon. They sent for a wagon and I helped to put him on the stretcher. We put him into the wagon and took him to the hospital. Dowling went to the hospital with him. When I got there Merriman was lying on the bank on the east side of the track, near the gate. I observed a pretty strong odor of liquor about Merriman.

On cross-examination the witness said: Dowling is a young man I have known for two or three years. He lives at 8th and L streets northeast. I was two squares south from the place of the accident when I heard of it. I was on 9th street between H and I. The crossing next nearest Washington from this place is the 8th Street crossing. I was not at 8th street that night nor at 7th. I

saw Johnson, the watchman, at 9th and L streets, where the accident happened. I knew him. I do not know whether he had a lantern or not. I had not seen Johnson at his post that evening at 7th and I. That was off my beat. When I got up to the spot Merriman was lying on the bank. I started for
 68 the patrol wagon, and I heard that some one else had gone for it. I looked down the street and saw the wagon coming up. I helped to put Merriman on the stretcher. Mr. Dalrymple helped me, and Mr. Fisher also helped. There were several young men there. I think Mr. Dowling helped also. I did not go to the hospital. Dowling got into the wagon and went to the hospital. The wagon man also went. I know there were two or three others who got into the wagon, but I do not know who they were. Fisher was the driver of the patrol wagon. I do not remember seeing Coghlan, the driver of the 9th precinct wagon, that night. Fisher did not drive the wagon; he had charge of the wagon, but did not drive it. When I got there I found that Dowling had gone for the wagon, and so I did not go. I asked Merriman where he lived, but he did not tell me at all. He said nothing about his wife. I heard him say nothing at all. When I got there he was lying on his face; his eyes were open and he appeared to be conscious. He said nothing that I heard. When I stooped down and helped to put him on the stretcher I smelt a pretty strong odor of liquor about him. Myself and Officer Dalrymple and two or three others were helping him. It smelt like some man had been drinking. I could not say that Merriman was drunk. If I had seen him walking on the street I could tell easily. I discerned the odor of liquor on his breath. I did not see anybody giving him any liquor. If they did it was before I got there. I saw nothing of that kind. At the time I came up the engine had gone away.

Thereupon the defendants, further to maintain the issues on their part joined, offered as a witness CLARENCE
 69 L. DALRYMPLE, who, being first duly sworn, deposes and says:

I am a policeman and have been for five years. On the night of the accident I was at the 7th Street crossing between I and K. I heard of the accident from a railroad man. He had a lantern. I supposed he had been flagging. I ran up to the point of the accident and saw the man lying up on the bank about five feet up from the railroad track. He was near about the L Street crossing. He was lying on a little knoll from five to ten feet distant from the planks at the crossing. At that time the engine was there. The pilot of the engine was pointing towards Baltimore. I am quite sure about that. When I got there there were two or three men there whom I took to be railroad men. I do not remember whether there was anybody else there or not. I know a man named O'Donnell, but whether he was there when I came up I could not say. I know neither Clark, Peters, nor Dillon. I know of Dillon. I did not see him where when I got there. I looked at the man and saw

that he ought to go to the hospital as quick as possible, so I went right down to the patrol-box for the wagon, and when the wagon came up I helped to put him in it. When I got back quite a crowd was there—six or seven persons. I do not know their names now. I noticed the headlight on the pilot of the engine, but I did not notice any other lights on the front. I did not notice any lights on the rear. The pilot of the engine was between the Florida Avenue and the L street Crossings. The distance between the two crossings is between twenty-five and fifty yards. I helped to put Merriman on the stretcher. I did not observe whether there was any odor of liquor about him or not.

On cross-examination the witness said: I did not go to the hospital. I think Mr. Fisher went there with him. The driver was a man named Coghlan. I had no conversation with Merriman. I heard him groan—that is all. I heard nobody else say anything to him. I did not hear him say a word. I think he was partly unconscious. I do not think his eyes were open. When I first went there I spoke to the railroad men. I told them that I would get a wagon. I do not recollect telling the men to wait until I got back. I recollect throwing a coat over Merriman. I did not stop to get the details of the accident until I went after the wagon. It was my duty to take the names of the men on the train. I may have told them to wait there until I got back, but I do not recollect positively. That was my duty; whether I did it or not I do not know. As I came back the engine was pulling out. I did not get the names of the men. I made a report of the accident, but did not mention the names. When I first heard of the accident I was standing at the 7th Street crossing. The watchman there was Mr. Johnson. He was in his watch-box. He had a light there. I did not see him lower or raise the gates during the evening I had seen him. Just before hearing of the accident I do not remember noticing a train coming into the city. I do not remember the condition or extent of the travel over the road that night. I don't remember having seen any trains coming into the city at or about the time of the accident.

71 Thereupon the defendant called as a witness JESSE RAMSBURGH, who, being duly sworn, testified as follows:

I have been a practicing physician about five years. On March 3rd, 1897, I was resident physician of Providence hospital. I remember the accident to Merriman. He reached the hospital late in the evening, nearly midnight. When he came in he was suffering from shock due to the accident. He was partly unconscious and very badly injured. There was an odor of liquor on his breath. Whether it was given to him by the ambulance driver or not before he reached the hospital, I couldn't say. He died in the morning, early the next day.

On cross-examination the witness testified as follows:

The man had been struck by a railroad train, and was suffering from shock and was very badly injured. He was partly uncon-

scious. I couldn't say whether his unconsciousness was due to liquor or not. I only noticed the odor of liquor about him.

Thereupon the defendant called as a witness HARRY C. REYNOLDS, who, being duly sworn, testified as follows:

I am a fireman on the Baltimore & Ohio railroad, and was fireman on March 3rd, 1897, and have been for thirty-two years. On March 3rd, 1897, about eleven o'clock p. m., I was on engine 1308, train 169, coming into Washington from Baltimore. I was leaning out of the window of the cab on the left side. We were on the right-hand track coming into Washington. When we came to the Florida Avenue crossing, I was leaning out of the cab window, and I noticed in between the watch-box and the first street near 72 the other side of Florida avenue a man in the middle of the track, with his hands in his pockets, walking with his head down. At that time the headlight of train 1402 showed down on him, and I halloared to him to look out, and when the engine of 1402 had passed I thought probably the man did not get off the track, and I don't suppose I was over twenty feet from him at the time. I saw that 1402 had stopped, but I did not know whether the man had been struck or not. We went to the station without stopping. Our train was a passenger train with three or four cars attached to it. When I first saw the man he was three or four steps from the watch-box in the middle of the tracks, walking with his head down, staggering right smart, and looking to me as if he was very drunk. He was going towards Washington on the east-bound track. At the moment I saw him No. 1402 was not over twenty feet away. No. 1402 was going to Baltimore as an extra, and I think it had two white lights at the extension and headlights. In the little time I had to see him we were going into Washington. 1402 was very close to him. He was staggering in the middle of the track. He had a dark suit of clothes on, and a stiff hat.

On cross-examination witness testified as follows:

As we were coming into the city I saw the man two or three steps from the end of the watch-box. At that time No. 1402 was about twenty feet away from him to the west, coming towards him. I called out of the cab window for him to look out. Our train did not stop, but kept right on. Our train was not going over five or six miles an hour.

Thereupon defendant called as a witness EDWARD B. JOHNSON, who, being duly sworn, testified as follows:

I am blockman at the Seventh Street crossing. I remember the accident in question. I heard of it from a brakeman 73 on an empty engine going out. I saw the engine. It passed out about quarter to eleven. The engine was carrying red signals behind and a headlight in front. I did not notice any other lights in front of the engine. After I heard that an accident had happened I went to the spot by myself. When I got there, there were

three or four men already there. The distance was about two squares away. I saw Mr. Dalrymple and a police officer named Nebb and a young man named Clements. I also saw Mr. O'Donnell. When I got there I told the trainmen to get out of the block. We have block signals to show when a train is ahead on the same block. We don't want a train ahead on the same block, for it delays trains coming in behind and keeps them from getting into the blocks, and, being a railroad man and understanding it, I told these men that I would take charge of the injured man and have him taken out of the way of other trains so that the other trains would have a chance to get into the block and proceed to Baltimore. Mr. Dalrymple took charge of the man. He had been after the patrol wagon at that time. I remained there until the wagon came. The man was lying on the bank between the two crossings. I had my lamp in my hand at this time. I stooped down over the man with my hand lamp while Mr. Clements went to the watch-box and got an old vest to spread over his private parts. He was torn to pieces in that part of his body as if he had been drawn along the track and torn. Mr. Clements got the vest and I stooped down and held the light while he spread the garment over the man. In stooping down over him he stunk
74 of whiskey. I could smell it strongly when I was holding my light. Mr. Clements is a plasterer. At that time he lived a few doors above the Seventh Street crossing. I lived right at the crossing, at Seventh & K streets. The gates at L street are operated by air pressure from the watch-box at Boundary. The watchman in that box operates the gates at the Florida Avenue crossing as well as the L Street crossing. The distance between the gates at these two crossings is about as far from the court-room to the monument in front of the court-house.

On cross-examination witness said: I went to the L Street crossing by myself. When I reached there O'Donnell was standing on one side of the bank at one side of the injured man. The man was lying on the bank between the two crossings. There were three or four other persons around him when I got there—Mr. Dalrymple, Mr. Clements, Mr. Nebb, Mr. O'Donnell and two or three other men whom I did not know. I did not notice the odor of liquor about any of the men standing there. I didn't notice if any of them had been drinking. Mr. Merriman smelt of whiskey, as if he was drunk. He had on blue pants, a gray shirt, and a dark-looking coat, and a black derby. It was not a fireman's hat. I got my lamp from the watchman at my crossing. It was a white lamp. I held the lamp while Mr. Clements was spreading the vest over Mr. Merriman. I held it right over the man's body. The light was down in his face. He was taken away in a patrol wagon. There were two men in charge of the wagon. Two of the men went with them. One of these men was Walter Dowling. I don't know the other. I re-
75 member seeing the light engine go pass my crossing, and just after it passed an incoming train also passed. The two trains met along about L and Boundary. The headlight of

one train showed on the other. They passed in the neighborhood of the L Street crossing. I don't say that it was right at the crossing. The light engine was moving slowly, about five or six miles an hour. The incoming train was going right lively, but not very fast. I could not say how fast. I noticed some one looking out of the window of the locomotive of the incoming train. I could not recognize him. It was midnight. The injured man, when I saw him, was lying on a bank between the two crossings, and the engine was standing between the two crossings. It was a good distance from the L Street crossing to the point where the man lay on the bank. The locomotive was between that point and the Florida Avenue crossing. It had not reached the Florida Avenue crossing.

Thereupon defendant called as a witness JAMES A. CLEMENTS, who, being duly sworn, testified as follows:

In March, 1897, I lived on Seventh street northeast, at the crossing. I was then, and am now, a plasterer. I knew Mr. Merriman by sight and had known him a couple of months or so. He lived on Ninth street between I and K streets northeast. About eleven o'clock on the night of March 3rd, 1897, I was standing at the crossing, talking to Mr. Johnson, the watchman. After leaving there I went up above, and just about that time an engine came along and stopped up there a while and the watchman told me to go up and see what was the matter, and I went up. The first time I saw the engine stop it was this side of the L Street crossing, and when I got up there it was between the two crossings. I saw
76 the light engine pass as I was talking to Mr. Johnson. It was going head front to Baltimore. I am sure of that. It had a headlight on. I don't remember any other lights. About that time I saw another train coming into the city. When I got up to the L Street crossing I saw a man lying on the bank. I recognized him as Mr. Merriman. I was told by the watchman to get something to cover the man with, and I went and broke the watch-box open and got a vest out and covered the man up with it. I looked at the man closely for the purpose of seeing who he was. When I stooped over I smelt intoxicating drink on him very strongly. I had my head close to his and smelt it very strongly. He was conscious. He did not say anything to me, but had been talking to the engineer just before that. I didn't hear him say anything. He was right about midway between the two crossings on the bank, two or three feet from the track. When I got there the train crew were there. I don't know their names. They were strangers to me. The engine was there, and also Mr. Johnson, Mr. Dalrymple, Mr. Nebb, Mr. Dowling, Mr. Dougherty, and a man named Glascoe. Nebbs is a policeman. About ten minutes after I got there, and after I had covered him up, the patrol wagon came and carried him away. Dowling and Glascoe helped to put him in the wagon. While I was standing there I saw the empty engine. The head was turned towards Baltimore. It was between the two crossings. The pilot of the engine was about fifteen or twenty feet from Flor-

ida avenue, probably less. I saw the engine when it started off to Baltimore. I did not stop there after Mr. Merriman was
77 carried away. Mr. Johnson stated that he would take charge, and gave the men orders to get out of the block, and they did so. At that time I knew Mr. O'Donnell by sight, but did not see him at all. He was not there when I got there.

On cross-examination the witness said: When I was standing at the Seventh & K Street crossing, talking to Mr. Johnson, he called my attention to the fact that an engine had stopped up there, and asked me to go and see what was the matter, and I did so. When I got up there the engine was between the two crossings, closer to L street than to Florida avenue. When Mr. Johnson called my attention to the fact that something had happened, I was looking towards Baltimore. I saw the engine before it stopped. I saw it when it passed the L Street crossing. Mr. Johnson told me it had stopped. I looked up the track and could see it, and I walked up to it. The engine was stationary when I got there. The engine stopped just on this side of the L Street crossing, and when I got up to where it was, it was between the two crossings. It stopped on this side of the L Street crossing first, then it went between the two crossings, and when I got there it was stationary. It stopped before it got to the L Street crossing, and when I got up to it, it was between the two crossings, stationary. The man was lying on the bank, right in the center. I noticed the incoming train. I saw the two trains pass. They passed between Seventh street and Florida avenue. I did not locate the point more nearly. It was a very dark night. When I saw the two trains pass, I was
standing at Seventh and K streets.

78 On redirect examination the witness testified as follows:

When I first saw the light engine it was coming from the depot. It passed right directly on the crossing. I saw it, I suppose, about Fourth street. I saw the smoke. I could not see the engine. When it got to Fifth street I could see the engine plainly. After it passed me it stopped on this side of L street and it stopped again in between the two tracks. I could not say how far this side of L street it stopped because I was standing at Seventh street. The distance between the L Street crossing and the Seventh Street crossing is about two squares, nearly three squares. The first time it stopped it stood still probably five minutes, probably a little longer. Then it passed beyond the crossing and stopped between the two crossings. When I first saw the incoming train, as nearly as I can come to it, it was about half way between Florida avenue and Seventh street, but I could not make any direct statement about that.

Thereupon defendant called as a witness WALTER D. DOWLING, who, being duly sworn, testified as follows:

I am a sign painter and at the time of the accident resided at 1100 Eighth street northeast, one square from Florida avenue. I remember the night of March 3rd, 1897. At about eleven o'clock

that night I was coming from downtown, where I had been to see the crowd. I had been out Eighth street and was coming back with another party, when I was asked if I had seen any regular policeman around. I told the party who asked me that I had not. Then I asked what was the matter and was informed that a man was hurt very
79 badly. I ran up there. Then some one telephoned for the ambulance or patrol wagon. I met Mr. Nebb and told him about it, and then came back to the scene of the accident and waited there until the patrol wagon came. There were not over five people there. I recognized the injured man. I had met him a couple of times before and had spoken to him; I had a casual acquaintance with him. The next morning I saw some blood stains on the rails; I noticed blood stains on the new rails which were to be put on the track; the blood stains were a little this side of the gate—between the gate and the watch-box. The rails were big, long, new rails. There is a brace at that point, and the end of the rails on which I noticed the stains were about fourteen or fifteen inches north of these braces or cross-beams towards Florida avenue, and there were a few stains a little farther up towards the watch-box at Florida avenue. The bulk of the blood stains were at the end of the new rails, and there were a few drops spattered farther up, but not very far. When the patrol wagon arrived I did not assist in putting him on the stretcher, but when he was put on the stretcher I helped to put him in the patrol wagon, and got up at his head and went to the hospital with him. When we arrived there I assisted in putting him in the ward. On the way up he appeared to be restless, and I asked him what he wanted. That was the first time that I noticed he was conscious. He wanted to turn over, but I told him to lie still. Then he said, "Raise my head." Then Mr. Fisher or one of the other parties got a blanket to put under his head, and I
80 lifted his head and held it in my hands. When I raised his head I could smell the odor of liquor. I am positive of that, and called Mr. Fisher's attention to it at this time. I had not seen Mr. Merriman on that day before the accident happened. I knew where Mr. Merriman lived at that time—at the corner house at the corner of Ninth and Florida avenue.

On cross-examination witness said: When I first learned of the accident it was slightly after eleven o'clock. My friend, who was with me, remarked shortly before that it was eleven o'clock. His name was Perry. Mr. O'Donnell informed me of the accident. I think he went further on, looking for a policeman, but I went right straight to the scene of the accident. I remember seeing about five people there, but I am not positive about the number. I then went after a policeman. I saw Mr. Nebb. He went after the patrol, and I came back and waited for the patrol. Mr. Fisher was in charge of the patrol wagon. I know Mr. Johnson, the watchman. There was somebody at the spot with a railroad lamp, but I did not recognize him. Only one of the parties whom I recognized outside of Mr. Fisher went in the patrol wagon to the hospital. I knew him

as Bert Clark, sometimes called Glascoe. There was another man on the seat with the driver. In the wagon were Glascoe, myself, a stranger, Mr. Merriman, and another party. I didn't recognize him, and didn't know him. There were four persons in the wagon, and the driver on the seat. I heard of the accident from Mr. O'Donnell, and then went to the scene. I then left there and acquainted Mr. Nebb with the fact of the accident, and he went after the wagon. I think I saw Officer Dalrymple, but I am not positive. I saw him when the patrol was leaving. I don't know whether he was there when I first went there. I could not recognize anybody. I only recognized Dalrymple when we were about leaving. The only thing that Mr. Merriman said while on the way to the hospital was that he wanted to be turned over. He appeared restless and made some remark to that effect. Then he said something about resting his head. When we were nearing Pennsylvania avenue he said something about Providence hospital, and I said, "That's where we are taking you." I didn't hear another word. I can't recall that he said he wanted to be taken home. I didn't hear him mention his name. He didn't recognize Glascoe that I know of. Glascoe was at his feet. When I got to the scene of the accident the locomotive and tender were not there. There was no engine anywhere around. There was an engine standing at Trinidad, and I suppose that was the same engine. Trinidad is about two minutes' walk from Florida Avenue crossing. When I got to the scene of the accident and looked up the track I saw that an engine had stopped at Trinidad, in the yard. The engine had not stopped there long, but I was not thinking about the engine. I simply know that an engine was stopping there. It looked to me like a train because it had red lights on the rear end, two red lights. I didn't know at that time whether it was a single engine or a train. I don't remember seeing an incoming train before the accident. I didn't hear any such train. That night Mr. Merriman had on a blue suit of clothes and a gray shirt. I didn't see his hat. I think the blue coat had brass buttons. He had on a gray shirt and, I think, black pants, because I helped the doctor to take them off at the hospital. I don't remember seeing his hat. The blood stains were on the railroad irons lying in the gutter. The blood was not in a clot. It was on the end of the rails as if he had been caught on the end of the rails and torn.

82 "Q. That is, caught on the end nearest the L Street crossing?"

"A. Yes, sir; towards Florida avenue, by the motion of the train."

On redirect examination witness testified as follows:

I saw an engine stop at the block on the east side track, about two minutes' walk from the Florida Avenue crossing. It is before you get to the turn-table. I saw the rear end of the engine with two red lights on it. The engine was headed due east towards Baltimore.

Thereupon defendant-called as a witness Wm. P. TOMKINS, who, being duly sworn, testified as follows:

I am a train despatcher. On March 3rd, 1897, I was employed at Camden station, Baltimore. I have in my hands the record of the movement of our trains and engines. At that time I directed the movement of our trains and engines in this District. I made the report myself. I have the record of the movement of engine 1402. Engine No. 1402 left Washington yard at 10.50 p. m. It passed the "Y" at Metropolitan junction at 10.53. The next account I have of it is where it passed Alexandria junction, at Hyattsville, at 11.31. The next account that I have of it is at Annapolis junction at 11.53, next at the Relay house at 12.08. That is the last account I have of it. That engine went to the round-house at Riverside, presumably. It did not pass into the station. It was a light engine going to the storage-house in Baltimore. There is nothing in the record to show which way the train was
83 headed. It was presumably headed the way they were going, but, of course, I didn't see it, and don't know which way they were headed.

On cross-examination the witness said: I made the record as I received the reports by telegraph. I was informed from time to time by telegraph of the progress of this train on its way to Baltimore from Washington. The "Y" is at the Metropolitan junction. I don't know the streets of Washington. I don't know the Florida Avenue crossing, but I have an idea of it. The "Y" is west of Florida Avenue crossing. In going from the Washington station to the Florida Avenue crossing you must first pass the "Y."

On redirect examination the witness testified as follows:

I have a record of the movement of the trains that night. Engine 1308, train 169, left Baltimore at 9.27, passed Relay at 9.54, Annapolis junction at 10.14, Hyattsville at 10.50, and arrived in the depot at Washington at 11.06. I have no record of the time that engine passed the "Y." It left Hyattsville at 10.50. The distance from Hyattsville to Washington is six or seven miles. It evidently passed the "Y" at 11.02. It takes from three to four minutes to get from that point to the depot in the shed. It takes about a minute and a half to get from Boundary to Metropolitan junction, so that it passed Boundary very near eleven o'clock; that is so with a local train making all the local stops. It don't make the time like an express train. It is about an hour and a half run, and it stops everywhere. He left Baltimore at 9.27 and got to Washington at 11.06—a little overtime, on account of the road being full of other trains, there being heavy travel and considerable rush on the road. The empty engine, No. 1402, passed Metropolitan junction presumably
84 at 10.59. It would take about two minutes to get from that point to the Boundary; that will make it about 11.01 that the empty passed Boundary and about 11.00 o'clock when the incoming train passed Boundary.

Thereupon defendant called as a witness WM. W. WALLACE, who, being duly sworn, testified as follows:

My occupation is cellar digging and cementing. In March, 1897, I lived on K street northeast between Eighth and Ninth streets. I do not know Mr. Merriman. I had seen him, but had no acquaintance with him. I recollect the occasion of the accident to him on March 3rd. I did not see the accident, but saw Mr. Merriman a little after eight o'clock that night. He was at the corner of Ninth and K streets. He was not doing anything but trying to make his way up Ninth street. He was under the influence of liquor. He walked two or three steps and then steadied himself, with a bucket in his hands. I could not tell what was in the bucket. It looked like beer. He looked like he was rushing the growler, as they say. He was going up towards the L Street and Florida Avenue crossings. There was no one with him. I should judge it was between eight and nine o'clock. The clock struck eight when I came in from the stable. I had not seen Mr. Merriman before that day. That was the first night I ever knew his name.

On cross-examination the witness said: The clock struck eight just before I came to the railroad to come into K street. It was on the night of March 3rd. I should judge it was ten or fifteen minutes past eight when I saw Mr. Merriman. I would not like to

say that it was as late as half past eight. When I first saw

85 him the lady who was standing there gave me his name. He had been living opposite to me all the time, but I did not know him. She said, "Heres comes Mr. Merriman, drunk as usual." The lady's name is Bisbee. She was from New York. She does not live here now. She rented a house from Mr. Warren and didn't pay no rent—wouldn't pay, and finally Mr. Bisbee lost his job and had to leave the house. When she made this remark I looked at Merriman, but I had not seen him before. He had a bucket in his hand, staggering drunk. I don't suppose he could walk in a straight line. He would walk a few steps and then steady himself. He did not fall down. Mrs. Bisbee said his name was Merriman. Before she spoke I did not recognize anything about him. He was Merriman. There was no doubt that it was him, not the slightest doubt. I had often seen him before, but had never learned his name before that night. I saw him after he was killed in his own house the next day. He was the same man that I had seen the day before. I am sure of that. When I saw him that night he had a blue suit on, and there were brass buttons on the suit. I think he had his fireman's uniform on. I did not notice his shirt because his collar was turned up. It was a cool night. The bucket he had was a tin bucket. He was very drunk. If an officer had met him he would certainly have run him in, in order to — care of him if nothing else, because he could not make his way. He was not saying a word, but he was staggering drunk.

Thereupon, further to maintain the issues on their part joined, the defendants called as a witness AUGUST J. HANFMAN, who, being first duly sworn, testified as follows:

86 I live at 727 H street northeast and was then employed as a bartender at Buechert's, 8th and H streets northeast. I knew Merriman. I heard of his death that night. I was told that he was killed. I had seen Merriman that day in my bar-room. It was before dark. I think Mr. Sullivan was with him one time when he was there. He was in there twice. I do not think Sullivan was with him on both occasions. Merriman took some whiskey. I served him. He had been drinking that day. I think he was under the influence of liquor.

On cross-examination the witness said: When I saw him it was late in the afternoon. I have no idea what time it was exactly. I am not positive, but I think Mr. Sullivan and he came in there in the early afternoon, but I am positive he was there late in the afternoon himself. I do not know who was with him then. It was before dark. I am not positive he was in there twice, but I am positive he was in there once. I was not positive he was in there twice, but I am sure he was in there once. The time I am positive about was late in the afternoon.

Upon being further interrogated on this point the witness said: I do not know that he was in there twice. I think he was in there twice, but I am not sure. I am sure he was in there once. That was late in the afternoon, before dark. I have been a bartender since 1891. I have worked at the business before that, too—here and there. I have been a bartender for some years, and all the time in the District of Columbia. I do not recollect that I said anything to Merriman that night when he was in there.

87 We are forbidden by the regulations to sell liquor to a man who is already under the influence of liquor. After I discerned that he was under the influence of liquor I served *with* with whiskey. Many a time a man comes in and you do not know whether he has drunk a drop or not; you do not notice until you give it to him, until he has had it, and then you turn him down. All the time I turn everybody down. It is my principle all the time to turn a man down if I notice it. Merriman was in there quite a while. I noticed that Merriman was drinking that day. I thought he was under the influence of liquor. I had that impression since that time. Not at the time he came in, but at the time I know he was in there, I knew that he was drinking. I do not recollect whether I noticed that he was under the influence of liquor before or after I had served him.

On redirect examination the witness said: I suppose a man who takes one drink is more or less under the influence of liquor. Merriman could take care of himself all right when he first came in there. He was not staggering, but had simply been drinking. We are not prohibited by law from selling a drink to a man who has taken a drink a short while before. We are prohibited from selling to a man under the influence so that you can notice it.

On recross-examination the witness said: Many a man comes in and you do not know he is drinking until you give him a drink. When I served him I do not remember whether I noticed he had been drinking or not. If I had noticed that he was drunk I would not have given it to him. When a man first comes in a place to get a drink, you can tell whether he has been drinking or
88 not, and you cannot turn him down. I would not sell to a man staggering drunk. Merriman was feeling all right that day—that is, he was under the influence of liquor—he was feeling all right.

Thereupon, further to maintain the issues on their part joined, the defendants called as a witness CHRISTOPHER DICE, who, being duly sworn, testified as follows:

In March, 1897, I resided in Uniontown. I am a carpenter. At that time I was working at Ivy City. I quit work after six o'clock. I walked into town by the railroad tracks, past the round-houses. I crossed Florida avenue at its intersection with the railroad track. I did not know Mr. Merriman by name. I might have seen him. I do not know that I have ever met him before. I met a man that was pretty close to the track and staggering, with a bucket in his hand. I did not know who he was, and did not find out until the next day about twelve o'clock. I then found out that a fireman by the name of Merriman had been run over. I did not see his body after his death. I connected the fireman who was run over with the man whom I had seen by the conversation I heard.

On cross-examination the witness said: The man whom I saw staggering and with a bucket in his hand was dressed in blue clothes or dark clothes. He had on a gray shirt. I could not say that he had on a fireman's uniform. I do not know whether he had brass buttons on his clothes or not. I do not think he had on a cap. I think he had on a stiff-brimmed hat. When I got pretty near to the L Street crossing he got on the track at the same time I
89 did. He spoke to me and said, "Hello." I said to him, "Brother, don't you get run over," and he said, "I don't guess I will be." Then I passed the L Street crossing and looked around and saw him going into the rear of the house right next to the railroad track, through the back gate. I did not look around any more until I got to the coal yard, and then did not see anything more of him. This was after six o'clock. It was pretty close to dark. He had a tin pail in his hands.

Thereupon, further to maintain the issues on their part joined, the defendants called as a witness Mrs. ANNA LISLES, who, being first duly sworn, testified as follows:

I live on Maryland avenue northeast, and am employed as a nurse. I am living with my husband. He is a painter by trade. In March, 1897, I lived at 11th street northeast. On March 3, 1897, I was on New York avenue near Fourth street, at work. I started home after ten o'clock. My husband was with me. We came out

New York avenue and down Florida avenue and over K to 11th street. We crossed the railroad tracks about quarter of 11, because the clock struck 11 when I got to K and 11th streets. That is about two squares from the Florida Avenue crossing. As I approached the railroad tracks I saw a gentleman come out of the corner brick house. I did not know him. When he came out of the corner brick house he got up on the car track just as I was crossing. I was close enough to speak. Then he turned right down the track as if he was going into the city. I observed his condition. He

90 was a drunken man, sure, and drunk as any man I would wish to see, because when he got in between the double gates he stopped as if he was going to fall. I called my husband's attention to him, and then I kept on. He came out of the front door of the corner house and started to walk down the track. He walked right down the tracks. When I last saw him he was between those two double gates and was standing as if he was going to fall. I called my husband's attention to him, and said, That man is certainly going to fall, and if he does he will certainly be killed by the train.

On cross-examination the witness said: I did not pay any attention to anybody else in the neighborhood at that time. I did not see any one and did not look to see. I saw the watchman at the gate. I went right straight down Florida avenue on the sidewalk. I did not notice whether any one was on this side of the street near the deaf and dumb asylum or not. When I got to 11th and K the bell rung 11 o'clock, and a little before I got there I heard the whistle on the engine blow. I could not tell which way the engine was going. That was just before I got to 11th street. The man I saw was dressed in black clothes, with a black derby hat. He was a medium-sized young white man. He was a kind of short man. He was a kind of short medium-sized man. He was drunk; just drunk enough to keep up, that was all. He stood still and swayed, and when he came up on the tracks he staggered. I only heard one engine blow. I heard it blow different times. I crossed the track at that point. I did not hear of the accident until the next morning. After crossing the track I did not look back, but kept on and paid no more attention. I do not know whether an engine

91 came up there and stopped. I do not know that this man had anything in his hands. When I last saw him he was right between the two gates going into the city. My husband and myself were the only persons in that neighborhood that I saw.

Thereupon the defendants read in evidence the deposition of JOHN W. MAJOR, JR., as follows:

My name is John W. Major, Jr. I live at 1225 N street north-east. I am a soldier in the regular Army of the United States. I enlisted March 30, 1899. When I first left here I went to Yellowstone park, and then was sent back here. Now we have orders to go to the Philippines. As far as I can find out, my regiment leaves June 24, 1899. I am obliged to be in San Francisco on June 29.

It is necessary that I should leave the city not later than tomorrow. Before I enlisted I lived at the same place I do now. I have been living here for about thirteen years. I know Mr. Merriman by sight. He lived on 9th street. I knew him by sight before the accident. I saw him pass along Florida avenue nearly every day. He used to go by there nearly every day. He was a fireman. I saw him on the 3rd of March. I do not know at what hour. I saw him two or three times during the day on Florida avenue, passing right along the railroad track. Once he had a bucket in his hand. I do not know what was in his bucket. The rest of the time I do not know what he was doing. He was just passing along. I saw him about 11 o'clock that night.

I was standing on the north side of Florida avenue. He
92 was on the south side waiting for the passenger train to pass.

The train was going into the city. He appeared to be very unsteady. He was staggering about. It appeared to me that he was drunk. When I first saw him he came out of the house. I was on the north side of the street while he was on the other. Just before I got to the crossing a passenger train was going in, and I had to stop and wait for it, and he stopped and waited for it, only he was on the south side and I was on the north. When the train passed I kept right straight up Florida avenue. He passed almost across the crossing, until he got on the east-bound track, and then he started down the track and I kept right straight out. By that time the passenger-train lights were going around the curve, and then a passenger engine came out and stopped at Florida avenue. That is all I know. I did not see him hit. I was told the next morning that the engine was No. 1402. I do not know of my own knowledge. The engine was moving head on, going towards Baltimore, cow-catcher front. The engine was not running backwards. I learned that Mr. Merriman had been hit the next morning. I cannot fix the time of night it was that Mr. Merriman came out of his house and walked down the tracks. It was between 11 and five minutes after. I was going home. I had been to the deaf and dumb asylum. I am twenty-one years old. Standing at the spot where I saw Merriman cross over the tracks and walk down the east-bound track, he could have seen at least three squares in towards the city. There are no houses along there, and there was nothing to obstruct his vision. At Florida avenue the railroad tracks are kind of down in a little hollow, and it

keeps that way nearly all the way to 7th street, and then
93 from 7th street down they are on a kind of embankment.

The house that I saw Merriman come out of was Mrs. Sullivan's house—the first house near the railroad. Her husband was a fireman; he was living at that time. The empty engine was moving not over four or five miles an hour. To go from Mr Sullivan's house to his own house Mr. Merriman could have gone right across the crossing at Florida avenue and around the watch-box. That would have been the most direct way. The L Street crossing is protected by gates, and also the Florida Avenue crossing. Mr. Merriman came out of Sullivan's house and stopped at the crossing

to wait for the train to pass. Then he came along after the train had passed and started down the east-bound track going south into the city. As soon as he got past the box I could not see him any more.

On cross examination the witness said: Mr. Merriman lived on 9th street. He could have come out the back way of Mr. Sullivan's house and gone right straight down 9th street. When I first saw him that night he was by himself; I am sure of that. When I first saw him he was just coming down off the steps of Sullivan's house. There was no one with him. After leaving the Sullivans house and after the train had passed, he went down the tracks. When I last saw him he was walking down the track. He had just got to the other side of the watch-box. I did not see anything in his hands. He seemed very unsteady and staggering. After
94 he got beyond the watch-box I could not see him any more.

I was on the other side of the street, about 300 feet from him. When I saw him staggering I was right across the street; the width of the street between us. I was on one side of the street and he was on the other. It was then that I saw him staggering. It was a pretty fair night; a little cool. I could not say exactly that it was a moonlight night. The stars were shining brightly. It was perfectly fair. You could see all right. The locomotive and tender stopped almost right straight across the crossing of Florida avenue. It was a good ways from the L Street crossing. The engine was right at Florida avenue. I did not see Merriman picked up. I did not know until the next day that he had been run over. I did not see any one else around there at the time. I did not see any of the men get off the locomotive. I just saw the engine when it stopped and did not look for any more. I kept on and went right straight home. I did not hear any cries. It was between 11 and quarter after 11, or 5 minutes after 11; something like that. The Sullivan house is on the south or west side of the tracks. The watch-box is on the east side. I had seen Merriman that day between four and five o'clock in the afternoon, but not after that until 11 o'clock. At 5 o'clock I could not say that he was drunk, but he looked like he had a little liquor in him. I was within 20 feet of him. I was sitting in the watch-box when he went by there. He was going towards the Sullivan house and went in the house. He was drunk then. That was between four and five o'clock. I had been at the watch-box all day and I saw him pass along there two
or three times. He was not staggering each time. The first

95 couple of times I saw him he did not appear to be drunk. I could not see what he had in his bucket. Mr. Sullivan was not with him at any time. I know Sullivan. He is a tall man with a sandy mustache. I do not know how old he is. I went to the watch-box the next morning. I saw some blood between the track and the banks, between this gate and the L Street crossing—that is, between the gate at the L Street crossing and the crossing itself. The gate lies some distance from the L Street crossing. The gate is about seven feet from this L Street crossing. The blood stains

were at a point north of the L Street crossing; about five feet, I suppose. When I saw Merriman going down the east track towards the city the gates at the L Street crossing were up, as were the gates at the Florida Avenue crossing. A man by the name of McCauley was in the watch-box that night until nine o'clock. The gates were not protected after nine o'clock. Nobody was in the watch-box after that time. I had remained in the watch-box until they closed at nine o'clock.

On redirect examination the witness said: When this accident happened I was on my way home from the deaf and dumb asylum. I did not stop at the watch-box at 11 o'clock. The crossing was unprotected after nine o'clock. I kept right straight on. When this engine came up and stopped at Florida avenue, I had no idea that an accident had happened. If I had I would have gone back there, because I mix up in everything that went on around there that I saw. Mr. Merriman did not cross the tracks at the L Street crossing that I saw. He only came across where I said he did. He came across to the east-bound track at Florida avenue, and then started down there.

96 Thereupon, further to maintain the issues on their part joined, the defendants called as a witness CLARENCE W. EAGAN, who, being first duly sworn, testified as follows:

I reside in Philadelphia, and am a civil engineer. I am assistant special agent of the B. & O. road, and prepare maps, models, and photographs for that company. I made the model showing the place at which this accident happened shortly after the accident. I made the model from actual survey. I have been employed by the B. & O. road since 1890. I am familiar with the locality at which this accident took place. At that point it is a pretty level piece of country, except at Florida avenue east, there it rises a little, but not much. The model which I prepared is according to schedule, 20 feet to the inch, horizontal, and 10 feet to the inch, vertical. The model correctly represents the situation at that place as near as I could make it. The distance between the L Street crossing and the Florida Avenue crossing, from center to center, is 150 feet 7½ inches. The distance from the eastern end of the L Street crossing to the west side of the Florida Avenue crossing, the two nearest points, is 100 feet. The distance between the two outer rails of the two tracks is 23.5 feet. The gauge is 4 feet 8½ inches. The distance between the east-bound track and the west-bound track—that is, the distance between the inner rails—is 7 feet 5 inches. There are three brick tenement-houses at the corner of Florida avenue. There is a watch-box on the other side of the tracks. The distance between the east gate of the L Street crossing and the beginning of the carriage-
97 way on Florida avenue is 80 feet. The distance between the same gate and the watch-box is 50 feet. The distance between the two gates at the L Street crossing is 60 feet. These gates are operated by straight air. The power is located in the

watch-box. Both sides of the gates are operated from the same box by the same machinery. A person walking down Florida avenue who reached the tracks at the crossing could see along the tracks in towards the city, a distance of 460 feet. If the same person reached the point midway between the two tracks at Florida avenue, he could see beyond that distance, out to 7th street, a distance of two squares west; perhaps a little beyond 7th street. There is nothing there to obstruct the vision or view. The height of the east embankment at the watch-box, above the level of the tracks, is very slight, and is $2\frac{1}{2}$ feet from the gutter. At the L Street crossing the ground along the tracks is practically on a level with the crossing.

On cross-examination the witness said: The house at the corner is correctly represented. There were a lot of boards back of the house. There was no back building. I am sure of that. I did not see any fence back of the house. I saw a pile of boards there. I did not see a shed there which the fence lead to. There was no back building there. If there had been I would have put it on the model. The photographs which are exhibited to me are a correct representation of the side of the Sullivan house. The addition shown on the photograph must have been built on afterwards. I did not see it there. I am not positive about that. The fence is shown on the

98 photograph. I did not see it there at the time, or if I did see if I thought it was of no consequence and did not put it on the model; but I am usually very careful about that. I think the shed must have been added since I made the model, and the back building also. However, be that as it may, this house takes in the exact area that is shown on the photograph. There is a pathway leading down along the side of the house. It ran very irregularly. It was very much worn.

Thereupon, further to maintain the issues on their part joined, the defendants called as a witness PAUL K. LEE, who, being first duly sworn, testified as follows:

I reside at 733 11th street northeast and am a flagman at the Florida Avenue crossing. I have been there since March 17, 1897. I was familiar with the crossing before I was employed there. I then lived at Ivy City. I passed the crossing every day. It was protected by two sets of gates. There are also two sets of gates at the L Street crossing, but there is one gate on the side that is operated that covers the crossing. The board walk does not extend to the other gates. These gates were operated by air from the little watch-box near Florida avenue. One man operates both gates. In the month of March, before and after the date of the accident, the gates were operated from six in the morning until nine at night. After night the gates were not lowered. The watchman left at nine and returned at six in the morning.

On cross-examination the witness said: There is a pipe that comes to the watch-box that leads to each gate. There is an eight-inch

99 cylinder with a lever attached, then there is a pipe that leads up from this cylinder to operate it by keys, and in order to lower those gates we have to turn two keys. At the Florida Avenue crossing we turn two keys down, and we have to pump it just the same as you pump an ordinary pump. That supplies the pipe with air, which supplies the cylinder in each gate. There are two cylinders in each gate. One cylinder lowers the gate and the other cylinder raises it. Each one of these cylinders is composed of a plunger, with four leather cups, and those cups are filled with oil. We do that in order to keep any air from escaping around behind the cups. When you pump those gates the keys are down. That lowers the gate. When the keys are straight up the gates are pumped up. In order to raise or lower the gates the operation of this device by a man is necessary. The gates are not automatic.

Thereupon, further to maintain the issues on their part joined, the defendants called as a witness WILLIAM LISLES, who, being first duly sworn, testified as follows:

In March, 1897, I lived at 712 11th street, between G and H streets northeast. On the night before inauguration I was at 4th and New York avenue, and about ten or 11 minutes to twelve I was at 9th and Florida Avenue crossing. I went down to see my wife home. We came down New York avenue to M street, through M to Florida avenue, and out at the deaf and dumb institution. We came down to a point where there were three brick houses, and in the corner house next to the railroad there was a stranger coming out of the house; he came out of the front door and on to Florida avenue and made a kind of stagger off the steps.

100 My wife remarked, "I believe that man is drunk." I said, "I don't know." We were close enough at the time to speak to him if he had anything to say. As soon as he got on the railroad he turned to his right on the track and went down a distance until he got between the double gates. He was standing in that position as if we were going to fall. I did not see him fall. He was acting like a drunken man. I do not know whether he was drunk or not. I did not see anything in his hands. He came out of the house towards me in a kind of drunken way and got on the track, and came right down on the right-hand track as you come into the city, and as he got between those gates he stood in a waddling condition. That was the last I saw of him. We kept straight across Florida avenue until we got to 11th street. It was a kind of hazy night and we could not see much. We could see he was a white man or a bright man by means of the electric light at the watch-box. He looked to be a middle-sized man. He was dressed in dark clothes—dark pants and coat and dark hat. It looked to be a derby hat. That is all I could state about his dress. When we left Florida avenue and 9th street and when we got to 11th and K the clock struck 11. It did not take us very long to walk a square. The distance from the Florida Avenue crossing to 11th street, where we were going, is about two squares.

On cross examination the witness said: I did not see anybody around at the time except my wife and myself. That is all I could see were there. When we were going down there was a man going up to the right. When we came down the center of the street
101 a man went up on the right, going up the avenue. He came towards us. He was on the right-hand side. He was going west and we were going east. We were both very near the track, and he came right across there. We were not very far from the crossing. At that time I did not see any train coming into the city. I did not have to wait for a train to pass. I did not see any train coming at all. After we got out of the track I heard a whistle blow. I do not know whether it was up the track or down the track. We were then on the other side of K street, right by Catholic church. The man I saw coming up Florida avenue appeared to be a short kind of a man. I could not tell whether he was young or old. I could not tell the age of the man who was staggering. I know he was a medium-sized man and knew the kind of clothes he had on, but I do not remember about the man who was on the other side of the street. He acted as if he was drunk, but this man being drunk my attention was called to him more than to the other one walking along. That other man did not act like he was drunk. I don't know whether this other man was a young man or an old man. The last I saw of the man on the track he was standing between the double gates at the Florida Avenue crossing. I did not notice his hands. I do not know whether he had gloves on or not. I did not notice whether he had anything in his hands. His hands were not in his pockets. I do not think he had an overcoat on. If he had, it was a short one. It was a kind of hazy night. It was not real dark and foggy. I do not think there was any moonlight. It was a pretty quiet night.

The defendants, further to maintain the issues on their
102 part joined, offered in evidence the act of the Legislative Assembly of the District of Columbia passed June 26, 1873, prohibiting the ringing of bells and blowing of whistles in the city of Washington, as follows:

"CHAP. LIII. An act to regulate the running of railroad trains and engines on the streets and avenues of the city of Washington.

"Be it enacted by the Legislative Assembly of the District that from and after the passage of this act it shall be unlawful for any railroad companies passing into the limits of the city of Washington with their engines to ring the bells of said engines or cause the blowing of steam whistles either at the crossings or in the lines of any of the streets or avenues or inside the limits of said city."

The defendants also offered in evidence that portion of the police regulations in force in the District of Columbia on March 3, 1897, which provided that the limit of speed of railroad trains in the city of Washington should be twelve miles an hour.

Further to maintain the issues upon their part joined, the defend-

ants offered in evidence the record in equity cause No. 19864, in the docket of the supreme court of the District of Columbia.

And thereupon the defendants closed their case-in-chief.

103 Thereupon the plaintiff, further to maintain the issues on his part joined, called as a witness SAMUEL R. HENRY, who, being first duly sworn, testified as follows:

I am foreman of truck company A, District fire department, and was the foreman of that company in March, 1897. At that time I knew Mr. Merriman. He belonged to No. 6 at that time. I remember the night he was killed. I saw him on Pennsylvania avenue between 9th and 10th, between 9 and 10 o'clock at night. The alarm of fire came in that night about 9.13. It took us about eight minutes to reach that point from the engine-house. The truck-house was on North Capitol between B and C streets northeast. It took us between six and eight minutes to go from the truck-house to the point where the fire was supposed to be. The city was crowded at that time and we could not make our usual time. It was the night before the inauguration. I saw Merriman near Galt's jewelry store as we were going to the fire. He mounted our apparatus there. The box was pulled at the engine-house on C street between 12th and 13th, and we were going to that box. We picked Merriman up on the Avenue between 9th and 10th streets. We were going between 10 and 12 miles an hour. We did not stop for him. He swung himself on, as our men sometimes do. It is a dangerous practice, though. He swung onto the truck as we were going at the rate of 10 or 12 miles an hour. We were going as fast as we could go. I did not notice anybody with Merriman. I noticed a man getting on and I said, "Who is this man?" Somebody replied, "That is Merriman, No. 6 fireman," and I replied, "All right," and we let him ride. When firemen are off duty they are

104 supposed to answer all alarms of fire during a time like that.

Our companies were short, and then men are supposed to answer all alarms of fire just as if they are regularly on duty. Merriman was off duty that day, and in joining us he was simply doing his duty. If he had not responded at that time he would have been brought up on charges, but he did respond. I saw him that night. I was within eight feet of him. He did not look to me like a man who was under the influence of liquor, because if he had been he could not have gotten on that apparatus. I did not see anything about him to indicate that he had been drinking. He was on the truck only a short time. The fire proved to be not much, and we pulled up and stopped our company just at Galt's place. They stopped us there by throwing up a light near 12th street. That was the signal from the companies that are in ahead to stop the companies coming on behind. Merriman got off the truck. He asked if we had seen his company and we said, "Yes; it is standing across the street." He went to join his company—No. 6—and that was the last I saw of him. He went to report to his foreman. That was his duty. I do not know when this fire was struck out that night.

On cross-examination the witness said: The truck is 26 feet long from hub to hub. It weighs about 9,000 pounds and was drawn by three horses. I think we could carry that vehicle at the rate of 12 miles an hour. I think we go over that sometimes. Street cars go from 10 to 12 miles an hour, and we have passed those often. On this occasion I was on the turn-table. I had my position right near the driver on the front part of the truck. Merriman
105 swung himself on about the middle—about 13 feet away from me. At the time he got on I did not know who it was. When we got a little further than Galt's store and pulled up he got off and walked across the street, and that was the last I saw of him. That was shortly before half past nine. It was between 9.13 and 9.30. The step on which a man would swing himself to get on that truck was about 16 inches from the ground. There is a side running board there to step on about 16 or 20 inches from the ground.

Thereupon plaintiff called as a witness JOHN M. SWEENEY, who, being duly sworn, testified as follows:

I was employed with truck "A" of the District fire department in March, 1897, and am still with that company. I knew Mr. Merriman. He was with No. 6 at that time. I saw him on the 3rd of March, 1897, on Pennsylvania avenue between Ninth & Tenth streets. We were going to a fire. While we were going to the fire he jumped on. We stopped in front of Galt's jewelry store. When he jumped on we were going pretty fast. I could not say how fast, but faster than I would like it to be going if I had to get on myself. After he jumped on I recognized him, I told the foreman who he was, and the foreman told me to let him stay on, as he would have to respond to the call. When we stopped in front of Galt's I was standing in front of the horses. He came around and shook hands with me, and I asked him what time it was. He referred me to Galt's clock and said, "There's the clock up there." It was then about twenty-five minutes past nine. While I was talking with him, his company came through D street. I told him that
106 his company was off there, and he started for it. He didn't show a bit of sign of intoxication to me. He didn't look as if he had been drinking. He had on citizen's clothes.

On cross-examination witness said: I know he had on citizen's clothes, but I could not describe them accurately. I know he didn't have on a white coat. I was talking to him and shook hands with him, but didn't notice his clothes. I spoke to him and shook hands with him, and when I told him his company was coming through D street he passed on. When he jumped on the truck it was going pretty rapidly. I would not have undertaken to get on at that speed.

Thereupon plaintiff called as a witness JAMES T. ROSSITER, who, being duly sworn, testified as follows:

I am connected with No. 10 engine-house and in March, 1897, was connected with truck "A." I knew Mr. Merriman
8—986A

and saw him on the night of March 3rd, 1897, on Pennsylvania avenue between Ninth and Tenth. He was standing on the sidewalk and was on our apparatus as we were passing to the fire. We were going about ten or twelve miles an hour. We were going at the usual gait when responding to a fire alarm, or as nearly as we could without running over anybody. The street was very much crowded that night. I saw him when he got on and spoke to him. He was sober, so far as I knew; nothing appeared to be the matter with him. He got on the truck without our stopping for him, and I presume that was an indication of his being all right. We stopped between Tenth & Eleventh streets, and he got off there. I presume he reported to his own company. That was a general rule.

107 On cross-examination witness said: He didn't look as if he had been drinking. He seemed to be perfectly sober. I said, "Hello, Merriman," and he said, "Hello," to me. I judge from the fact that he got on the truck while we were moving at a pretty good speed that he was all right. I didn't notice anything wrong with him. He rode two or three squares with us, and when the truck came to a standstill he got off and went about his own affairs. This was between nine and ten o'clock. The alarm was struck at 9.13 and was struck out at 9.43 p. m. I heard of his death the next morning, and we got to talking about his being with us the night before.

Thereupon plaintiff called as a witness EDWARD L. HUNT, who, being duly sworn, testified as follows:

I am a fireman in the District fire department, and in March, 1897, was with company No. 6, the same company that Merriman was connected with. I saw him on March 3rd between 9 and ten o'clock p. m. I saw him step on the back of the carriage at the corner of Tenth & Pennsylvania avenue. I merely spoke to him. We were not on very good terms. I was on the step of the carriage when he stepped on. He looked to me as if he was all right, as far as I knew. I can't say anything about his showing signs of intoxication. I was with him every day. He was assistant foreman and my superior. He stepped on the carriage, and acted as I had always seen him. I don't remember how far he rode with us. He got on the step after we started. He was off duty that day.

On cross-examination witness said: No. 6 at that time was located on Massachusetts avenue between Fourth and Fifth. Shortly
108 before this we had some difficulty, but at that time we were pretty near as friends. I was subject to his orders, and had to do what he said. On this occasion we simply spoke to each other. I did not observe him particularly. I saw that he was on, and that was about all. I don't -- whether or not he went back to the engine-house with us. I didn't see him there. He didn't have to go back. He reported after the alarm of fire. I don't know to whom he reported. Foreman Smith was in charge of the truck. I suppose it was his duty to report to Mr. Smith. Smith was on the seat in front with the driver.

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Thereupon plaintiff called as a witness EDWARD L. HUNT, who, being duly sworn, testified as follows:

I am a fireman in the District fire department, and in March, 1897, was with company No. 6, the same company that Merriman was connected with. I saw him on March 3rd between 9 and ten o'clock p. m. I saw him step on the back of the carriage at the corner of Tenth & Pennsylvania avenue. I merely spoke to him. We were not on very good terms. I was on the step of the carriage when he stepped on. He looked to me as if he was all right, as far as I knew. I can't say anything about his showing signs of intoxication. I was with him every day. He was assistant foreman and my superior. He stepped on the carriage, and acted as I had always seen him. I don't remember how far he rode with us. He got on the step after we started. He was off duty that day.

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Thereupon plaintiff called as a witness CORNELIUS T. O'BRIEN, who testified as follows :

In March, 1897, I was with No. 6 company, where Merriman was also employed. I saw him on the night of March 3rd, 1897, on the Avenue right by the Franklin statue. We were responding to the alarm, and stopped there. I spoke to him. I was on the seat of the carriage. I don't remember that he was on the carriage. He may have got on it. I merely spoke to him. He was all right, so far as I know ; perfectly sober, so far as I could see. He simply spoke to me and I spoke to him. He was not on duty that day. He was not supposed to answer an alarm of fire on that day. He was assistant foreman.

On cross-examination witness said : I was the driver at that time. I met him at the Franklin statue at the corner of Tenth & D streets. I spoke to him. He responded, and that was the last I saw of him.

109 Thereupon plaintiff called as a witness WILLIAM F. LANAHAN, who, being duly sworn, testified as follows :

In March, 1897, I was connected with No. 6 of the fire department, and still am. Merriman was assistant foreman of that company. On the night of March 3rd, 1897, I saw him at the corner of Tenth & Pennsylvania avenue about 9.30 in the evening. We were going back after responding to an alarm from box 151. I was on the carriage when I saw him. I don't know whether he got on or off. I merely saw him and didn't pay any attention to him. I didn't speak to him that night. I didn't observe anything to indicate that he was intoxicated. I should say he was not. He looked at me like a sober man. That is all I know. He didn't go back to the engine-house with us.

On cross-examination witness said : He was off duty that day. I didn't speak to him. I just looked at him. He and I were not on speaking terms at this time. There was a coolness between us. I was within a few feet of him. I looked at him, that was all. I looked at him casually and that is all I saw him.

Thereupon plaintiff called as a witness JOHN HENRY DAVIDSON, who, being duly sworn, testified as follows :

I am a fireman in No. 6 company. Mr. Merriman was assistant foreman of that company. I saw him on the night of March 3rd, 1897, near the corner of Tenth and the Avenue. I was in the Chief's buggy that night and stopped there. Chief Parris was with me. Merriman came over and said that I had his cap on, and asked me not to loose it. I said, " No, it is a cap like yours." Then he passed a few joking remarks and I left him. I had a cap precisely
110 like Mr. Merriman's. I didn't have any other talk with him. I left Merriman behind me. I am sure I didn't see anything about him to indicate that he was intoxicated.

On cross-examination witness said : Merriman was by himself when I saw him. I know Mr. Sullivan. I didn't see him with

Merriman. There was a large crowd around, just as there always is around a fire. When I told Merriman that I didn't have his cap, but that it was one like his, he said, "That's all right," and then he went away. That was all that took place.

Thereupon plaintiff recalled JAMES T. ROSSITER, who testified as follows:

I knew Frank Sullivan. I saw him on the night of March 3rd, 1897, with Merriman. They were on the sidewalk. They were both on the truck together. I didn't see them leave the truck. I presume he went to his company to report to the officers in charge. I didn't see him any more. Sullivan was a member of company No. 10. They happened to be off on the same day, and, being friends, they were together. Sullivan didn't report to No. 10. It was his day off, and he had a perfect right to go home if he chose. Sullivan was about five feet eight or nine inches high, stout, of florid complexion, and weighed one hundred and eighty-five pounds. Sullivan was a little taller than Merriman and was smooth-faced. Merriman was about five feet seven inches, a medium-sized man. Sullivan was not obliged to report to the company that night. His company didn't respond to the alarm of fire. The fire was out of that company's jurisdiction.

Thereupon plaintiff recalled JOHN M. SWEENEY, who testified as follows:

I knew Frank Sullivan, of No. 10. I saw him the night of March 3rd, 1897, when he got on the truck with Merriman. I didn't see either of them after they left the truck. Sullivan weighed about one hundred and ninety pounds. He was about five feet nine inches tall and smooth-faced. He was pretty heavily built.

Thereupon plaintiff recalled CORNELIUS T. O'BRIEN, who testified as follows:

I didn't see Sullivan on that night. I was the driver of No. 6 hose carriage. I saw Mr. Merriman down there, but didn't see him jump on the carriage. Sullivan didn't get on the seat with me. There was a pretty large crowd in the neighborhood of Tenth & Pennsylvania avenue that night. Besides being inauguration night, there was an alarm of fire struck.

Thereupon plaintiff called as a witness WILLIAM J. MANDERS, who testified as follows:

After the accident in question had been reported to me I went down to where Merriman was lying on the railroad track and saw him. I didn't detect any odor of liquor about him. There were not so many people there when I got there. It was a good while before the patrol wagon came.

Thereupon plaintiff recalled MAURICE DILLON, who testified as follows:

I didn't go to the hospital in the wagon with Merriman. I was at the place of the accident when the patrol wagon left, and had been

there in the presence of Merriman about an hour. I had seen him during that time. I was standing right there. I didn't notice any evidence of his being intoxicated. I didn't detect the odor of
112 whiskey about him. He was conscious and talking. He spoke right along until we put him in the patrol wagon.

On cross-examination witness said: I was not talking to Merriman, but Mr. Glascoe was talking to him. I didn't know the man myself. I was near enough to talk to him; my head was right down to his. I made no remark to him and he didn't reply to me. I was there about three-quarter- of an hour or more. The engine was there all that time, and remained there until Merriman was taken away. After we put him in the patrol wagon and the patrol started off with him the engine left.

Thereupon the plaintiff recalled HOWARD PETERS, who testified as follows:

I went to the hospital in the patrol wagon with Merriman. With me were Mr. Glascoe and another young man, a stranger, Officer Fisher, and the driver, Coghlan. I think there was also a policeman along, but I am not sure. Merriman did not seem to be intoxicated. I did not smell liquor. He was sensible and conscious and knew everything; he seemed to be all right; he seemed to be sober.

On cross-examination the witness said: I was at the foot of the wagon and Mr. Merriman's head was towards the front.

Thereupon the plaintiff recalled JAMES O'DONNELL, who testified as follows:

I did not notice anything about Merriman to indicate that he was intoxicated. When I first saw him I picked his head up
113 and I never smelt the odor of liquor or anything upon him. When I first saw him he was not conscious at all.

On cross-examination the witness said: I had not been drinking myself that day. I have been in the police court for being drunk and disorderly. I was not convicted, but forfeited collateral. That was in January, before the accident. On the 19th of November, 1896, I was arrested for being drunk and disorderly, and was fined \$5.00 in the police court. I might have been arrested and fined for being drunk in July, 1896. I was arrested on another occasion by Officer Wheeler for being disorderly, but I was not drunk.

Thereupon the plaintiff called in rebuttal JOSEPH COGHLAN, who, being duly sworn, testified as follows:

I am connected with the police department, as patrol driver, at No. 9 precinct. I was on duty the night Mr. Merriman was injured, and drove the patrol wagon. I saw Merriman as we were going to the hospital. I stood at the wagon while they were getting him in on the stretcher. He first said, "Drive fast, I am all smashed up." I was going over some rough ground until I got to the concrete streets, and I told him that I would drive as fast as I

could when I got in the smooth part of the city. He was pretty badly smashed up, but he had sense enough to tell me a couple of times to hurry up, and I did so. That is about the only thing he said. He complained of his back a couple of times. I did not notice anything about him to indicate that he was intoxicated. I did not smell the odor of liquor about him. He asked me to drive fast, as any man would; he was anxious to get to the hospital.

114 He knew where he was going.

On cross-examination the witness said: I did not help to put him in the wagon. I was holding my horse and stood in the wagon. I was holding the brake and the wagon at the time that Mr. Fisher and Mr. Dalrymple put him in. I remained on the side and did not get into the body of the wagon at all. I could not say whether he had been drinking or not. I was not close enough to him to say whether he had been drinking or not. I do not think I could tell whether he was intoxicated or not. I did not notice any evidences of it. He seemed to be very anxious in asking me to go fast, and I told him I would.

Thereupon the plaintiff called in rebuttal JOSEPH PARRIS, who, being duly sworn, testified as follows:

I am chief of the fire department in this city, and have been for a number of years, and was in March, 1897. I knew Mr. Merriman, and remember the night that he was killed. We went to a fire on D Street between 12th and 13th. I was in my buggy with Mr. Davidson. I saw Merriman that night at 10th and D streets, but did not take any particular notice of him. I was about 10 or 15 feet away from him. I did not notice anything about him to indicate that he was intoxicated. I do not remember that Mr. Merriman came to my buggy and spoke to me that night. He might have done so. I was not taking notice of that side. I was looking more to the right. There was not much of a crowd at that place. I had been at the Pension Office that night, and I went around there to look around and see how things were arranged. A little
115 after nine o'clock Mr. Davidson came there with my wagon and told me that an alarm had been sounded. I got in and drove down G street to 10th. When I got there I met No. 6 carriage coming back. I drove past the carriage, turned around and came behind the carriage. When I came behind the carriage I saw Merriman standing on the side of No. 6. It looked to me as though he had just gotten off the step of the carriage.

On cross-examination the witness said: I could not state whether Merriman had been drinking or not. If I had thought he was drinking I would have been very apt to have called him. I was sitting only about 15 feet from him; 15 or 18 feet, or probably more. I merely glanced at him and recognized him; that was all.

Whereupon the defendants, to maintain the issues on their part joined, offered to prove that in 1894 an understanding was reached between the Commissioners of the District of Columbia and the

Baltimore and Ohio Railroad Company as to streets passed over by the lines of the Baltimore and Ohio railroad which should be protected by safety gates, and the hours in which watchman should be stationed at such crossings so — to protect them; that by virtue of such understanding particular directions were made by the Commissioners covering this matter; that as to Florida Avenue and L Street crossings, which were treated as one, the company was required to keep a watchman at these crossings for the purpose of attending the gates from six o'clock a. m. until nine o'clock p. m.; that in the fall of 1897, after the accident in question, the defend-

116 ant company was notified by the Commissioners that because of the increased travel over several of the streets crossed by the railroad additional precautions had to be taken, and thereupon, at the suggestion of the company, an examination was made by the police department of all the streets crossed over by the tracks of the company, and the Commissioners requested to make such further additional requirements covering the whole case as to them seemed necessary and safe; that this report of the Commissioners shows that at the time the requirements of the Florida Avenue and L Street crossings were as above stated—that is, requiring a watchman there from six a. m. to nine p. m.—that it was deemed by the Commissioners insufficient, and thereupon the company was ordered to keep a watchman there night and day at the Florida Avenue and L Street crossings; that the report referred to by the Commissioners was made on or about November 17, 1897, and is on file at the office of the Commissioners.

Thereupon the defendants, further to maintain the issues on their part joined, called as a witness JOHN B. WIGHT, who testified as follows:

I was appointed one of the Commissioners of the District of Columbia in May, 1897. The attention of the Commissioners was directed to the matter of the grade crossings along the line of the Baltimore and Ohio railroad in the fall of 1897. Action was taken by the Commissioners to find out the existing precautions and regulations in that regard, and for the purpose of determining whether or not additional precautions were necessary. I called the atten-

117 tion of the railroad authorities to the inadequacy of protection in certain directions, and the railroad company suggested that we should take up the whole matter and cover the whole case by one direction as to what they should be compelled to do to give better service. I called for the report from the police department as to actual conditions existing at that time along the lines of railroads existing in this District, and received the reports. I had the reports compiled, showing the actual conditions at all the grade crossings, and based upon that made certain recommendations as to changes. Accompanying the compilation was my recommendation to the Commissioners suggesting certain changes, and the approval of the two then Commissioners, Commissioner Ross and Commissioner Black. Where the figures O. K. are set opposite a number of streets it indicates that the attention paid to those crossings was

considered sufficient in my opinion. Where they were not so marked I indicated in red an additional length of time which I thought should be given to these crossings. The Florida Avenue and L Street crossings were reported as being watched by the watchman and guarded by gates from six a. m. until nine p. m. I recommended that it be watched continuously for twenty-four hours—that is, as to the Florida Avenue crossing. The L Street crossing was reported as having a very moderate amount of travel over it, and I recommended that it remain as it was. The report indicated that there was a moderate amount of travel at L street. The report does not speak of the L Street crossing being watched at all. Attached to these papers is a letter signed by the president of the Board of Commissioners, conveying the information of their action, to Mr. Hamilton, as attorney for the Baltimore and Ohio Railroad Company; which letter is as follows:

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“ OCTOBER 19TH, 1897.

George. E. Hamilton, attorney for the Baltimore & Ohio Railroad Company :

“ The Commissioners of the District of Columbia have the honor to transmit herewith a copy of recommendations which they have approved, having in view the further protection of the public at the grade crossings of the tracks of your company in the District of Columbia. These conclusions have been arrived at after careful consideration, but if they do not approve themselves to you or to the officers of your company the Commissioners will be glad to confer with you further in the matter.

“ In accordance with the understanding had at a recent interview with the Commissioners, they will be pleased to have you give them the name of the official of the Baltimore and Ohio Railroad Company residing in the District upon whom service of process can be had.”

The recommendations, based upon the reports of the several police officers of the precincts through which the lines of the railroad company run, reads as follows :

“ Recommendation.—The matter of the further protection of the grade crossings of the Baltimore and Ohio Railroad Company in the District of Columbia having been referred to me, I have to report that a careful examination has been made into the condition of all of the grade crossings of this road, and a list is herewith appended showing the location of these crossings, the amount of travel, and the present arrangements which the company has for protecting them.

119 “ In the recommendations I have to make, asking for further protection at some of the crossings, I have endeavored to consider the matter fairly, with a view of asking what is reasonable and proper. Some of these crossings are travelled but little, and over the crossings of the Alexandria branch only two freight trains are run a day. It would not seem reasonable to require the company to guard such crossings continuously. All of these cross-

ings are provided, however, with danger signal sign-posts near the track."

(That refers to the Alexandria branch, a branch in the county.)

"The crossings of D and E streets, Massachusetts avenue, G, H, I, and K streets are now guarded continuously for twenty-four hours. In addition to these, I recommend that the company be requested to guard the crossings at M street, Florida avenue (Metropolitan branch), Bunker Hill road, Carroll avenue, Fourth, Fifth, Seventh streets, and Florida avenue (Washington branch), and Mount Olivet road, for twenty-four hours continuously. These crossings are now guarded from six a. m. to 9 p. m., and the amount of travel over them appears to me to be sufficiently large to make the requisition for continuous watching reasonable."

"I further recommend that the company be requested to assign no other duties to the men who are employed to watch grade crossings, for it is believed that the discharge of other duties prevents their giving proper attention to the guarding of the tracks.

"If the foregoing recommendations are carried out I think the grade crossings of the Baltimore and Ohio Railroad Company in the District of Columbia will be sufficiently guarded if those crossing the tracks will use such diligence and precautions as is reasonable to expect."

120 That letter, Mr. Hamilton states, was received by him and replied to on October 21st. The date of that communication was October 21st, 1897, and on the 21st of October Mr. Hamilton replied to the Commissioner, stating that:

"Your favor of the 19th instant, enclosing a copy of recommendations (which is a copy of the paper just read) as to the better protection of grade crossings on the line of the Baltimore and Ohio Railroad Company, was received.

"I will take up this matter immediately with General Manager Greene, and will, at an early date, make a more definite reply."

On November 10th of the same year Mr. Hamilton replied more definitely to the communication, and the letter of that date is as follows:

"In further reply to the communication of Hon. John W. Ross, president of your board, transmitting copy of recommendations approved by your board, and having in view the further protection of the public at the grade crossings of the Baltimore and Ohio Railroad Company in the District of Columbia, I have to state that your report has been fully considered by the officials of the Baltimore and Ohio Railroad Company, and that by them I am instructed to say that your recommendations that the crossings at M street, Florida avenue (Metropolitan branch), Fourth street, Seventh street, and Florida avenue (Washington branch), should be for twenty-four hours continuously guarded, are concurred in by the company."

"But in regard to the crossings at Bunker Hill road, Carroll

avenue, Fifth street, and Mount Olivet road, from the information obtained by the company, from careful observation and watch, the company thinks that if these crossings are guarded from six o'clock a. m. until twelve o'clock at night all reasonable requirements will be met and the public fully protected. In regard to these last-named crossings, therefore, we request that you will, in the light of the suggestions now made, consider the same, and see if by additional information the position taken by the company is not a correct one.

"In regard to the recommendation that the Monroe Street crossing on the Alexandria branch"—

We do not care for that here.

"In regard to the crossing on R street." That relates to Eckington.

"We also concur in your views that the watchman should be relieved from any further duties, so that their exclusive attention may be given to the watch.

"I have to say further that in regard to the crossings at Bunker Hill road, Carroll avenue, Fifth street, and Mount Olivet road, when the travel at and across these places increases sufficiently to demand it, the company will be prepared to accede to any reasonable recommendation then made by your board."

Now, then, I go to another question in regard to the time limit at crossings. We do not want to hear that.

MR. DAVIS: Yes; we do. Did you read that?

MR. HAMILTON: No; I did not read it. I will, however, if you wish it. We were trying then to make a difference of a few minutes as to the time we would be allowed to stop freight trains at crossings; that was all.

THE COURT: This all going in under your objection. If it is not relevant, probably it ought not to go in.

122 MR. DAVIS: It is immaterial, your honor. It refers to something entirely different.

THE COURT: Yes; I supposed so. It should not go in if it is immaterial or irrelevant, referring to some other matter.

MR. HAMILTON (reading): "Not by the Commissioners, but by certain newspapers, the Baltimore and Ohio Railroad Company has been criticized"—

MR. HAMILTON: This relates to the same thing.

MR. DAVIS: Let me see it. I do not care about what the newspapers say.

MR. HAMILTON: This relates to the delay of acting in this regard, and I just wanted to state what the communication said.

MR. DAVIS (after examining letter): No; that ought not to go in. Show it to the court. It has nothing to do with this.

MR. HAMILTON: I do not care particularly for it. The next communication on the subject of that report is to the general manager:

"Your favor of the 26th ultimo is received and I will act according to the instructions therein contained.

"Under the agreement, additional guards at crossings"—

Mr. DAVIS: You have not read the communication of the 26th.

Mr. HAMILTON: No; it is telling us to do exactly what I transmitted to the Commissioners in this report:

“Under the agreement, additional guards at crossings are to be provided as follows: The crossings at M street, Florida avenue (Metropolitan branch), Fourth street, Seventh street, and 123 Florida avenue (Washington branch) are to be guarded continuously for twenty-four hours instead of from six o'clock a. m. to nine o'clock p. m. The crossings at Bunker Hill road, Carroll avenue, Fifth street, and Mount Olivet road from six a. m. until twelve o'clock at night instead of from six o'clock a. m. until nine o'clock p. m., and in regard to the crossing at Monroe street.” That is in Anacostia and need not be mentioned.

“This appears from the report of Commissioner Wight and my communication to the Commissioners, which is hereto attached.

“I have informed the Commissioners that their requests as to these additional safeguards at crossings will be carried into effect on or before January 1st, 1898.”

This is written on December 1st, 1897.

Mr. TUCKER: Mr. Hamilton, do I understand that there is a crossing at M street, just below L, with a gate?

Mr. DAVIS: On this Washington branch?

Mr. TUCKER: This L Street crossing is the M Street crossing, as I understand?

Mr. HAMILTON: Oh, no; it is the L Street crossing.

Mr. TUCKER: Where is the M Street crossing?

Mr. HAMILTON: M street is not opened at all.

Mr. TUCKER: Then, why do you refer to the M Street crossing?

Mr. HAMILTON: That is M street on the Metropolitan branch.

Mr. TUCKER: You have referred all along there to the Florida Avenue and M Street crossings in connection with each other.

124 Mr. DAVIS: No; Florida avenue and L street. The M Street crossing is on the Metropolitan branch. That is right. There is no M Street crossing on the Washington branch. Is that correct?

Mr. HAMILTON: That is correct; it is not open.

Mr. DAVIS: I mean to say there is no crossing

Mr. HAMILTON: No.

Thereupon the witness JOHN B. WIGHT proceeded to testify as follows:

To the best of my recollection the action taken by the Commissioners was that the changes agreed upon finally should be carried into effect; that those crossings which, in their opinion, needed additional care and longer number of hours were required to be guarded twenty-four hours instead of the time theretofore given to them. That order has been issued and has been enforced ever since and is now in force.

On cross-examination the witness testified as follows:

I became Commissioner in May, 1897. I could not say when my

attention was first called to the question of the protection of grade crossings. I remember very distinctly that the action was taken, reports called for, and changes ordered. I was absent from the city from August 15 to September 15, 1897, and I brought this matter to the attention of the Commissioners early in October, 1897. I made this recommendation and communicated it to the attorney of the Baltimore and Ohio Railroad Company under date of October 19. I gave directions for reports from the police department after I returned to the city after my vacation. The reports made by the different officers connected with the police department were in writing. I cannot say that I recollect the accident which happened to Mr. Merriman at this crossing. It may have been called to my attention. I think that shortly after I went into office representatives of the Northeast Washington Citizens' Association called on me with reference to the unsafe protection of grade crossings on the Baltimore and Ohio road in that section of the city. I do not recollect that my attention was called to this accident. I was nominated for office on the first of May, 1897. I do not recollect that this accident was brought to my attention; very likely it was mentioned to me. My attention was called to the conditions existing in that section of the city, and I was asked for relief and for betterments. Thereupon I caused an investigation to be made for the purpose of deciding for myself whether or not the Commissioners ought to require better protections than then existing, and — a result the Commissioners did require better protection.

Thereupon the witness read in evidence the following letter:

"NOVEMBER 12, 1897.

George E. Hamilton, Esq., attorney and counsellor at law.

DEAR SIR: The Commissioners direct me to inform you that they approve of the suggestions made in your communication of the 10th instant, regarding additional protection at the grade crossings of the Baltimore and Ohio railroad, in the District of Columbia, and that they will take under advisement your views relative to the regulation and limit of the time of obstruction of streets by the trains of said company.

Very respectfully, WM. TINDALL, *Secretary.*"

Before I was nominated as Commissioner and while my nomination was looked for, I was spoken to by some persons interested in the northeast section of the city with reference to desired action on my part, should I become Commissioner, in relation to the grade crossings of the Baltimore and Ohio road in that section. That was kept up, in fact, after I was nominated and took office. I took my vacation about the middle of August, 1897, and was away from the city for about a month. When I returned I took up this matter of the railroad crossings again. There was a good deal of talk about the inadequate protection of the crossings before I went away. I took up the questions of grade crossings as a general

question, not alone in the case of the Baltimore and Ohio, but in the case of the Pennsylvania road. I called for reports, received the reports, and gave my personal attention to the question of improving conditions where they needed to be improved, and as a result I called upon the Baltimore and Ohio Railroad Company in October, 1897, to make certain changes, among others, to provide additional protection at the Florida Avenue crossing of the Washington branch of that road, and the company did provide
127 additional protection. In the first talks that I had about the Baltimore and Ohio Railroad affairs I do not recall that any reference was made to the Florida Avenue or L Street crossing, but only to the danger of grade crossings in general.

Thereupon the plaintiff called as a witness WILLIAM J. MADIGAN, who, being duly sworn, testified as follows:

I *ma* a gas inspector, and was such in March, 1897. In March, 1897, I knew John A. Merriman. I saw him that night between nine and ten o'clock. I was sitting in No. 6 engine-house when an alarm of fire came in from box 151. That is on D street between 12th and 13th streets northwest. I went down with the company to 10th and the Avenue and crossed over to the south side of the Avenue between 11th and 12th, where we stopped. After we had been standing there a few minutes Mr. Merriman came up and spoke to me, and I also spoke to him. He said to me, "You have got my cap on, haven't you?" and I said, "Yes; I believe I have." He asked me where I got it, and I told him I took it off the rack. He then said, "Don't forget to put it back there when you get back to quarters." I told him I would do so, and a couple of minutes after that we started to return to quarters, and he was still standing there. I said, "Come on; aren't you going up?" He answered, "Yes; I believe I will." He jumped on the step of the carriage and rode part of the way with us. Then he dropped off and said, "I have a friend around here somewheres; I had better find him." That was the last that I saw of him. On that night I think he was perfectly sober.

On cross examination the witness said: I did not belong to the fire department at that time. I had on Merriman's
128 cap that night. I often went with the fire company when they were called out, and do so yet.

And this was all the evidence offered by the parties to this cause.

Thereupon the plaintiff requested the court to instruct the jury as follows:

1. The jury is instructed that it was the duty of the defendants to cause the safety gates at the crossing known as the L or M Street crossing, described in the testimony, to be closed during the passage of any train, locomotive, or car over the tracks of the Baltimore and Ohio railroad at that point, or otherwise so to guard the said crossing as to give warning of the approach of such train, locomotive, or

car to persons liable to pass over the said crossing; and if the jury shall find that at the time of the passing of said crossing by the locomotive which struck the plaintiff's intestate, as described in the testimony, the said gates were not so closed, and that there was at that point no other protection of the said crossing or warning of danger to persons liable to pass over the same than the mere existence of the said railroad tracks and crossing, the jury is instructed that the plaintiff is entitled to recover, unless it shall further find from the evidence that the plaintiff's said intestate, in attempting to pass over said railroad and crossing (if the jury shall find as a fact that the plaintiff's said intestate did attempt so to do), failed to act as a reasonably prudent man would have acted under the circumstances, and that his failure so to act directly contributed to the causing of the injury to him in the premises.

129 2. In considering whether the plaintiff's intestate was guilty of negligence contributing to the injury to him, as described in the testimony, it is not necessary that the jury shall find in the evidence affirmative proof that the plaintiff's intestate looked and listened before attempting to pass over the crossing, in the foregoing instruction mentioned (if the jury find as a fact that the plaintiff's intestate did pass or attempt to pass over the same), but it is competent for the jury, in connection with all the other facts and circumstances of the case, to infer the fact that the said intestate did so look and listen, and that there was an absence of fault on his part in the premises, from the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger.

3. If the jury shall find for the plaintiff, it is instructed that it may assess by its verdict such damages as in its opinion the evidence shows to represent the pecuniary loss caused to the widow and children of the plaintiff's intestate by his death; and in this connection the jury may consider the age of the widow, the number and ages of the said children, the age and health of the said intestate, and his earning capacity at the time of his death, but that such damages cannot under the law exceed ten thousand dollars.

But to the granting of the said first and second prayers of the plaintiff the defendants, by their counsel, then and there objected; but the court overruled said objection and granted said prayers; to which ruling of the court the defendants, by their counsel, then and there excepted, and said exception was noted upon the minutes of the court, to have the same force and effect as if the rulings
130 excepted to were severally set out in separate bills of exception.

Thereupon the defendants, by their counsel, requested the court to instruct the jury as follows:

8. The jury are instructed that if they find from all the evidence that the decedent received the injuries which caused his death while crossing the railroad tracks at a point which was not a street crossing, then the plaintiff is not entitled to recover in this action.

9. The jury are instructed that, under the pleadings and all the evidence in this cause, the plaintiff is not entitled to recover in this action.

11. The jury are instructed that no presumption can arise in this case that the decedent Merriman, before crossing the tracks of the railroad company, looked and listened to discover the approach of engines or trains and failed to discover the approach of such engines and trains before attempting to cross said tracks.

But the court refused to give said prayers thus offered on behalf of the defendants; to which ruling of the court the defendants, by their counsel, then and there excepted, and said exception was noted upon the minutes of the court, to have the same force and effect as if the rulings excepted to were severally set out in separate bills of exception.

Whereupon the court, of its own motion, proceeded to charge the jury as follows:

GENTLEMEN OF THE JURY: You have been occupied for several days in listening to the testimony and hearing the
131 argument in the case of Thomas Childs, plaintiff, *vs.* John K. Cowen and Oscar G. Murray, receivers of the Baltimore and Ohio Railroad Company, a corporation, defendants. It now becomes the duty of the court to give you, in charge, the law applicable to a proper consideration of the facts which have been adduced by the evidence in the case.

The declaration filed in the case by the plaintiff sets forth the fact that "the plaintiff, Thomas Childs, heretofore duly appointed by this court administrator of the estate of John A. Merriman, deceased, and bringing into court his letters of administration, sues the defendants, John K. Cowen and Oscar G. Murray, who were heretofore, to wit, on March 2, 1896, in a cause pending in this court and known as equity cause No. 17197, duly appointed and have since qualified as receivers of the Baltimore and Ohio Railroad Company, a corporation operating a steam railroad, and having an office and doing business in the District of Columbia, and have had from thence hitherto full possession, control, and management of said railroad, together with the rolling stock, tracks, cars, locomotives, tenders, etc., appertaining to said railroad, sues the defendant receivers for that, to wit, on March 3, 1897, at the said District of Columbia, while said railroad was under the care, government, and direction of said defendants, the plaintiff's intestate, the said John A. Merriman, at or about eleven o'clock in the evening, was crossing the tracks of said railroad at or near a point where L street northeast crosses the tracks of said railroad in the city of Washington, in said District, at which point there was and
132 had been for many years a regular railroad crossing, and while on or near said point was, by reason of the carelessness, negligence, and improper conduct of said defendant receivers, by their servants and employes, struck and mortally injured by a tender of said railroad which was being pushed or propelled backwards by a locomotive of said railroad, both of which said

tender and locomotive were then and there under the direction and control of said defendant receivers and their servants and employés; and that although there were and had been for many years railroad gates at said crossing, which it was the duty of the said defendant receivers and their servants and employés to let down upon the approach of trains to said crossing so as to prevent persons crossing the tracks at such point, and although at the time of the wrong and injury complained of trains of said railroad were passing and repassing at said point with great frequency owing to the increase of passenger traffic over said railroad by reason of the inaugural ceremonies in the city of Washington on the day following, to wit, the fourth of March, 1897, thus necessitating greater care on the part of said defendant receivers and their servants and employés at said crossing, said gates were, by reason of the carelessness, negligence, and improper conduct of said defendants and their servants and employés, then and there up and unguarded by any servant or employé of said defendant receivers, the servant or employé usually in attendance at said point having left his post of duty several hours theretofore; that although said tender was so being propelled or pushed backward by said locomotive at said crossing, the said defendant receivers and their servants and employés then and there carelessly and negligently omitted
 133 to place on said tender, as it was their duty to do, any light or lights to warn said decedent and persons crossing said tracks at said crossing of its approach; and, further, that said defendant receivers and their servants and employés then and there carelessly and negligently omitted to sound any bell or whistle upon the approach of said tender and locomotive to warn said decedent and persons crossing said tracks at said crossing of the approach of said locomotive and tender, as it was their duty to do; that by reason of the injury so received plaintiff's intestate died on the day following, to wit, on March 4, 1897, and left surviving him a widow and four infant children as his sole next of kin, all of whom were dependent upon him for support and are now left in destitute circumstances."

The plaintiff avers that by reason of the premises an action has accrued to him as administrator by the statute in such case made and provided, and that the said widow and next of kin have sustained damage in the amount of \$10,000, for which they bring suit.

The plea is the general issue—a denial on the part of the defendant of the existence of the facts thus stated in this declaration—and that puts upon the plaintiff the burden of proving by a preponderance of evidence all of the material facts alleged in this declaration to order to entitle the plaintiff to your verdict.

It is perhaps unnecessary that the court should give you in general charge instructions as to the rules of law which it may be proper to give you, for the reason that counsel in preparing
 134 their charges have in a general way and to a great extent placed in the possession of the court such prayers for instruction as the court, in its judgment, concludes should be given

to the jury, and in giving you those instructions the court may add something for the purpose of further explaining the points to which they relate, so that you may have a full understanding of your duties.

The first instruction asked by the plaintiff, and which the court has concluded to give you, is as follows:

("The jury is instructed that it was the duty of the defendants to cause the safety gates at the crossing known as the L or M Street crossing, described in the testimony, to be closed during the passage of any train, locomotive, or car over the tracks of the Baltimore and Ohio railroad at that point, or otherwise so to guard the said crossing as to give warning of the approach of such train, locomotive, or car to persons liable to pass over the said crossing, and if the jury shall find that at the time of the passing of said crossing by the locomotive which struck the plaintiff's intestate, as described in the testimony, the said gates were not so closed, and that there was at that point no other protection of the said crossing or warning of danger to persons liable to pass over the same than the mere existence of the said railroad tracks and crossing, the jury is instructed that the plaintiff is entitled to recover, unless it shall further find from the evidence that the plaintiff's said intestate, in attempting to pass over said railroad and crossing (if the jury shall find as a fact that the plaintiff's said intestate did attempt to
135 do so), failed to act as a reasonably prudent man would have acted under the circumstances, and that his failure so to act directly contributed to the causing of the injury to him in the premises.")

The second instruction asked by the plaintiff is as follows:

("In considering whether the plaintiff's intestate was guilty of negligence contributing to the injury to him, as described in the testimony, it is not necessary that the jury shall find in the evidence affirmative proof that the plaintiff's intestate looked and listened before attempting to pass over the crossing, in the foregoing instruction mentioned (if the jury find as a fact that the plaintiff's intestate did pass or attempt to pass over the same); but it is competent for the jury, in connection with all the other facts and circumstances of the case, to infer the fact that the said intestate did so look and listen, and that there was an absence of fault on his part in the premises from the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger.")

Upon these two points certain instructions have been asked by the defendants, which will be given to you as the law:

(1.) "The jury are instructed that there can be no recovery in this case merely on account of the failure of the engine which struck the decedent, John A. Merriman, inflicting the injuries which caused his death, to ring its bell or to sound its whistle on approaching the L Street crossing or the Florida Avenue crossing, the sounding of such whistle and the ringing of such bells being prohibited by the municipal ordinances of the city of Washington."

136 (2.) "The jury are instructed that if they find from all the evidence that the engine which struck the plaintiff, inflicting the injuries which caused his death, was moving towards the east, head front, and with its tender in the rear, and that on the front of said engine there was a headlight, and two additional lights on either side of the engine, there can be no recovery in this action on account of the alleged failure of said engine to display suitable lights to give warning to persons about to cross the tracks of the railroad company of the approach of said engine."

(3.) "The jury are instructed that if the decedent, immediately before the accident, was aware of the fact that the gates of the L Street crossing and the Florida Avenue crossing were not being operated, and that there was no watchman at said crossing to lower the gates at the approach of trains, and with such knowledge the decedent failed to look and listen, but attempted to cross the said railroad tracks, and if the jury further find that at that time the engine which struck the decedent was approaching, head front, displaying its headlight and two additional lights in front of the engine, then the jury are instructed that the plaintiff is not entitled to recover."

And that, gentlemen, for the reason that if you should find the facts to be as stated in this prayer which I have just read, it would be negligence on the part of the plaintiff decedent himself to attempt to cross under such circumstances without looking or

137 listening, being aware that the gates were up, and that there was no one present to let them down or to raise them up, but that in that respect the crossing was entirely unattended, without any means of warning travellers. If, being aware of those facts, he should attempt to cross without looking or listening, it would be negligence on his part directly contributing to his injury — the accident which happened to him, and would have prevented him, had he lived, from bringing any action or recovering in any action, and would prevent his administrator from recovering anything in this action.

Following this, and in the same line, in a more general way, is the fourth prayer of the defendant:

(4.) "The jury are instructed that if the deceased in any manner and to any extent, by his own carelessness or imprudence, contributed to the accident which caused his death, the plaintiff is not entitled to recover in this action, even though the jury should further find that the defendants were also negligent in any of the particulars mentioned in the declaration."

Following this is still another instruction in the same line, meaning practically the same thing; but I give it to you, as it is a proper expression of the law under such circumstances:

(5) "The jury are instructed that it was the duty of the decedent, in approaching the tracks of the railroad company on the night of the accident and in attempting to cross said tracks, to use all diligence and precautions which a reasonably careful person would have

exercised under the same circumstances to inform himself of
 138 the approach of engines or trains, and if the jury find that the decedent failed to use such reasonable care, and that such failure on his part in any manner contributed to the injury which caused his death, then the plaintiff is not entitled to recover in this action."

The sixth prayer of the defendants is as follows:

(6.) "The jury are instructed that even if they find from all the evidence that the decedent was crossing the tracks of the railroad company at the L Street crossing at a time when the gates were up, and when the decedent had no knowledge that said gates were not being operated at that hour for the purpose of protecting said crossing, yet the jury are instructed that it was the duty of the decedent to look and listen for the approach of trains, and if he failed so to look and listen the plaintiff is not entitled to recover, even though the jury may find that the defendants were also negligent in some degree."

The seventh prayer of the defendants will be given, with some oral explanations, by the court:

(7.) "The jury are instructed that if they find from all the evidence that the decedent was walking along the railroad tracks, instead of across them, and while so walking was struck and injured, then the plaintiff is not entitled to recover in this action."

That is, in the first place, because it is not averred in the declaration that he was walking along the track, but that he was crossing the track at or near the L Street crossing. It would be a departure

from the declaration on the part of the evidence, and for that
 139 reason the jury would not be authorized to bring in a verdict for the plaintiff. And if the facts stated in the instruction are true, the plaintiff would not be entitled to recover for another reason, perhaps: That *prima facie* it would be negligence for a person, at that hour of the night, to walk upon a railroad track (which according to the averments of the declaration and the pleadings in this case and according to the evidence had trains frequently running upon it at about the time of this injury), unless it be under circumstances that show that it was not negligence on the part of the plaintiff to do so, but that was a thing that a prudent man or a man of ordinary care and caution would have done unless the evidence clearly shows that, and repels all idea of negligence. If there was negligence upon his part it would be contributory negligence tending or contributing to the injury which he received.

You will observe, gentlemen, that the declaration avers that this injury occurred to the plaintiff's intestate at or near the L Street crossing. The proof in the case, in order to entitle the plaintiff to recover, must show that that averment of the declaration is substantially true. (It is not necessary that it should appear that he was exactly and technically upon the crossing,) but that he was substantially using the crossing, and so near to it as to be practically the same thing as though he were actually on the crossing, so that

the use of the gates, for instance, would be notice which would be received from them, so that it would be shown that his purpose was to cross at that crossing in the ordinary and usual way. (If
140 that was his purpose, and he was at or near the crossing—so near as to be practically the same thing as if he was upon the crossing, then the averment of the declaration would be sustained, and if all other things are proven which the court has charged you must be proven to entitle the plaintiff to recover, your verdict should be for him if you find that the injury was received by the plaintiff's intestate at or near the L Street crossing); but if it was away from the L Street crossing so that it could not be said that he was attempting to cross the railroad practically at that crossing, then, as I have already in substance charged you, the averment of the declaration would not be sustained—it would not be the same cause of action which is set forth in the declaration, and the plaintiff would not be entitled to recover.

You will perceive, gentlemen, that the question for you to determine is, first, under the evidence and under the instructions of the court were the defendants negligent—was there negligence on the part of the employés of the defendants?

You are instructed, gentlemen, that under the law, or under a rule which obtains in the District and has the force and effect of law, the defendants were bound to have this crossing closed during the passage of any locomotive on the tracks at the crossing at the junction of the street and the railroad “or otherwise so to guard the said crossing as to give warning of the approach of such train, locomotive, or car to persons liable to pass over the said crossing.”)

That I have already said to you (if you shall find that at the
141 time of the passing of said crossing by the locomotive which struck the plaintiff's intestate, as described in the testimony, the said gates were not so closed, and that there was at that point no other protection of the said crossing or warning of danger to persons liable to pass over the same than the mere existence of the said railroad tracks and crossing, you are instructed that the plaintiff is entitled to recover, unless—and that is the other feature of the case—“unless you shall further find from the evidence that the plaintiff's said intestate in attempting to pass over said railroad and crossing (if you shall find as a fact that the plaintiff's said intestate did attempt so to do) failed to act as a reasonably prudent man would have acted under the circumstances.”)

Now, upon the subject of contributory negligence by the plaintiff's intestate, whether he acted prudently and reasonably or not, I have given you the instruction asked for by the plaintiff, and several instructions asked for by the defendants. The proof must show to your satisfaction that the defendants were guilty of negligence in the manner in which I have charged you, by giving you the plaintiff's instructions upon that point. If satisfied upon that point, then you will inquire in relation to the negligence of the deceased. That is not to be presumed, neither is negligence of the defendants to be presumed. It is for the plaintiff to prove negli-

gence on the part of the defendants to entitle him to a verdict. If he has succeeded, in your judgment, in proving negligence on the part of the defendants, then you will inquire whether the plaintiff's intestate was negligent, and that is something that the defendants must prove. You will not presume the negligence of the decedent, but the defendants must have shown to your satisfaction by a preponderance of the evidence that the plaintiff's decedent was negligent; and if that is proved, then, no matter whether the defendants were negligent or not, the plaintiff cannot recover if the plaintiff's decedent himself was negligent.

That is the whole inquiry, gentlemen. There is a good deal of testimony which I shall not undertake to analyze or to bring especially to your attention. Counsel have done so and you have listened carefully to the testimony, but there are two main propositions. The first is, were the defendants negligent? Are they shown to be so by a preponderance of the evidence, applying carefully the rules of law as the court has given them to you? If you shall find that the defendants were negligent, then the next question will be whether or not the plaintiff's decedent was also negligent. If he was not negligent in your judgment, if he is not shown to be negligent by a preponderance of the evidence and you find the defendants were negligent, it will be your duty to return a verdict for the plaintiff. If, on the other hand, you find that the plaintiff's decedent was negligent, if he did not act as an ordinarily prudent and careful man would have acted under the same circumstances, then it will be your duty to return a verdict for the defendants.

I have already given you, in substance, the following instruction:

(10.) "The jury are instructed that the burden of proving negligence on the part of the defendant, resulting in the injury which caused the decedent's death, is upon the plaintiff, and unless the jury are satisfied by a fair preponderance of the evidence that such negligence on the part of the defendant has been established, the verdict should be for the defendant."

That is practically in about the same words given to you before.

If you shall, gentlemen, come to the conclusion, upon the whole, that the plaintiff is entitled to your verdict, it will then become necessary for you to determine in what sum your verdict shall be, and upon that proposition I give you the prayer of the plaintiff, which, I believe, is not objected to by the counsel for the defendants:

(3.) "If the jury shall find for the plaintiff, it is instructed that it may assess, by its verdict, such damages as in its opinion the evidence shows to represent the pecuniary loss caused to the widow and children of the plaintiff's intestate by his death; and in this connection the jury may consider the age of the widow, the number and ages of the said children, the age and health of the intestate, and his earning capacity at the time of his death; but that such damages cannot, under the law, exceed ten thousand dollars."

Gentlemen, in connection with the second prayer of the plaintiff,

which I gave to you as the law, I will add a few words. I read, first, the instruction again :

((2.) " In considering whether the plaintiff's intestate was guilty of negligence contributory to the injury to him, as described in the testimony, it is not necessary that the jury shall find in the
144 evidence affirmative proof that the plaintiff's intestate looked and listened before attempting to pass over the crossing in the foregoing instruction mentioned (if the jury find as a fact that the plaintiff's intestate did pass or attempt to pass over the same); but it is competent for the jury, in connection with all the other facts and circumstances of the case, to infer the fact that the said intestate did so look and listen and that there was an absence of fault on his part in the premises, from the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger.")

(Now, gentlemen, it is perhaps the experience of mankind that men ordinarily act prudently when in the presence of known danger; and therefore in the absence of any proof whatever as to the action of the plaintiff's decedent in regard to looking and listening for a passing train, if there be no evidence whatever upon that point, either circumstances or direct, positive evidence as to whether he did or did not act prudently, it may be a presumption of law, being in accordance with the experience of mankind, that he did look and listen, as he was bound to do in such a situation; but such presumption must yield to the evidence.) If the evidence shows to your satisfaction (that is, by a preponderance) that he did not look and listen, then the presumption that would arise as matter of law, and from the general experience of mankind, would not obtain. If he is shown by the evidence not to have listened, if he did not look out
145 when crossing the track or when attempting to cross the track of the defendants, he would be guilty of contributory negligence and would not be entitled to a verdict.

And to that portion of the court's oral charge which again instructed the jury as requested in the plaintiff's first and second prayers the defendants, by their counsel, then and there excepted, and said exception was noted upon the minutes of the court, to have the same force and effect as if the rulings excepted to were severally set out in separate bills of exception.

And the defendants, by their counsel, also excepted to those portions of the court's oral charge marked in brackets. Said exceptions were severally noted upon the minutes of the court, to have the same force and effect as if the rulings excepted to were set up in separate bills of exception.

And the defendants prayed the court to sign and seal this bill of exceptions, which is accordingly done, now for then, this 26th day of March, A. D. 1900.

E. F. BINGHAM, C. J. [SEAL.]

Settled by consent.

HENRY E. DAVIS &
CHAS. COWLES TUCKER,
Attorneys for Plaintiff.
HAMILTON & COLBERT,
Attorneys for Defendants.

146 *Stipulation for Extension of Time within which to File Bill of Exceptions.*

Filed April 14, 1900.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS	}	Law. No. 41124.
vs.		
JOHN K. COWEN ET AL.		

It is hereby stipulated and agreed by and between counsel for plaintiff and defendants that the bill of exceptions in the above-entitled case need not be presented to the court for approval until March 26, 1900.

DAVIS & TUCKER,
For the Plaintiff.
HAMILTON & COLBERT,
Attorneys for Defendants.

147 *Stipulation as to Filing of Record in Court of Appeals.*

Filed April 14, 1900.

In the Supreme Court of the District of Columbia.

THOMAS CHILDS	}	Law. No. 41124.
vs.		
JOHN K. COWEN ET AL.		

It is hereby stipulated and agreed by and between counsel for plaintiff and defendants that the transcript of the record in the above-entitled cause need not be filed in the Court of Appeals until the 20th day of April, 1900.

DAVIS & TUCKER,
For the Plaintiff.
HAMILTON & COLBERT,
Attorneys for Defendants.

148 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 147, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 41124, at law, wherein Adelaide M. Merriman, administratrix, &c., is plaintiff and John K. Cowen and Oscar G. Murray, receivers, &c., are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto sub-
Seal Supreme Court scribe my name and affix the seal of said
of the District of court, at the city of Washington, in said
Columbia. District, this 16th day of April, A. D.

1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 986. John K. Cowen *et al.*, receivers, &c., appellants, *vs.* Adelaide M. Merriman, ad'm'x, &c. Court of Appeals, District of Columbia. Filed Apr. 16, 1900. Robert Willett, clerk.

